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AUG 17 2009

IOWA UTILITIES BOARD

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DATE: August 17, 2009

CASE: Docket No. FCU-07-02, *IN RE: Qwest Communications Corporation vs. Superior Telephone Cooperative et al.*

SUBJECT MATTER: **GREAT LAKES COMMUNICATION CORPORATION AND SUPERIOR TELEPHONE COOPERATIVE MOTION TO STAY PROCEEDINGS**

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STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

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Executive Secretary

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IOWA UTILITIES BOARD

In re:

Qwest Communications Corp.,

Complainant,

v.

Superior Telephone Cooperative, *et al.*,

Movants.

Docket No. FCU-07-2

GREAT LAKES COMMUNICATION CORP.
AND SUPERIOR TELEPHONE COOPERATIVE
MOTION TO STAY PROCEEDINGS

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Great Lakes Communication Corp. ("Great Lakes") and Superior Telephone Cooperative ("Superior") (collectively, "Movants"), by and through counsel, hereby respectfully request that this Board stay all further proceedings in this case pending the Federal Communications Commission's ("FCC's") consideration of Movants' Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption filed August 14, 2009, a copy of which is attached hereto (the "Petition").

DISCUSSION

As was demonstrated throughout this proceeding and at the Hearing, only a *de minimis* portion of the traffic Qwest placed at issue before the Board comprises intrastate calls. The lion's share of the call traffic in this case, as well as many of the legal underpinnings of Qwest's claims, are interstate in nature.

Interstate communications are strictly within the FCC's exclusive jurisdiction. 47 U.S.C. § 152. As the FCC recently reiterated:

When a service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission's exclusive jurisdiction.¹

The relief Qwest seeks from this Board, as set forth in Qwest's Proposed Findings of Fact and Conclusions of Law ("Qwest FFCL") and its lengthy post-hearing briefs, is relief that only the FCC is capable of granting. Yet the Board announced at its public meeting held August 14, 2009, that it intends to grant much of the relief that Qwest seeks, despite the Board having no authority to address matters that concern interstate traffic. To that end, Movants have petitioned the Commission to issue a Declaratory Ruling to define for the Board what are the jurisdictional limitations on regulating matters of access and of interstate telecommunications services. In

¹ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404, 22413 ¶ 17 (2004) ("Vonage Order").

addition, Movants have petitioned the Commission for contingent preemption of an order issued by this Board that embraces any of Qwest's proposed relief. Because their Petition seeks to settle fundamental questions regarding the Board's ability to address Qwest's claims, Movants request that the Board stay this proceeding and abstain from issuing a final order until the Commission rules on Movants' Petition.

The Board can enter a stay where the movant demonstrates that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay. Iowa Code § 17A.19(5)(c). A strong showing of irreparable harm is unnecessary, however, if the movant demonstrates a strong likelihood of success on the merits. *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.").

The FCC's Media Bureau ("Bureau") recently stayed an *ultra vires* attempt to regulate the rates of a communications provider in *Charter Communications Entertainment I, LLC*, 22 FCC Rcd. 13890 (2007) ("*Charter Order*"). In that case, Charter Communications successfully obtained a stay of a proceeding in which the City of St. Louis issued an order that retroactively lowered Charter's cable service rates, despite a strong likelihood that the City had no such authority. *Id.* at 13890-91.

The Bureau applied an analysis that was very similar to the four-factor test provided in Section 17A.19(5)(c) of the Iowa Code. *Id.* at 13892. It reasoned even without a fully developed record, that first, Charter had submitted sufficient numerical evidence to demonstrate that the Commission, and not the City, had authority over its operations and rates because of the

presence of effective competition. *Id.* Charter was thus likely to succeed on the merits because it was engaging in an activity over which the Commission had exclusive authority to regulate based on a Congressional grant of authority. *Id.* Secondly, however, the Bureau found that Charter did not make a strong showing that it would suffer irreparable harm if a stay were not granted, because it would likely be able to recoup the rate differential from its subscribers later if the petition ultimately succeeded. *Id.* Third, the Bureau found that Charter's subscribers would be adversely affected by a stay of the City's order to lower petitioner's rates. *Id.*

Even despite its findings as to the balance of harms, the Media Bureau nonetheless granted a stay on the basis of Charter's likelihood of demonstrating success on the merits. That is, the likelihood of a finding that the City had no authority to regulate cable service rates which are exclusively within the Commission's purview. *Id.* at 13893. The Bureau reasoned that the driving factor in considering a stay is the threshold question of whether the governmental body had the authority to do what it did. *Id.*

This conclusion informed the fourth factor — whether the public interest favors granting the stay. *Id.* Here, the Bureau concluded that despite the short-term economic benefit of a rate reduction to Charter's subscribers, the City's effort to enforce an order it had no authority to issue in the first place, followed by Charter's efforts to recoup its losses, "would waste the time and energy" of both parties. *Id.* The public interest thus favored issuing the stay, because it is the general public — taxpayers and consumers — who would bear the costs of restoring the status quo. *Id.* For all these reasons, the petition for stay was granted.

In comparison, the facts of this proceeding militate even more strongly in favor of entering a stay. First, Movants' Petition is likely to be granted by the Commission. *See* Iowa Code § 17A.19(5)(c). As shown in the Petition, which Movants incorporate herein, any attempt

to grant Qwest its proposed relief would merit preemption under any of the criteria for federal preemption enunciated in *Louisiana PSC*.² Further, in a jurisdictionally indistinguishable case, the Commission granted Vonage's request for preemption of state regulation of Voice over Internet Protocol service which

clearly enables intrastate communications, [and] it also enables interstate communications. It is therefore a jurisdictionally mixed service, and this Commission has exclusive jurisdiction under the Act to determine the policies and rules, if any, that govern the interstate aspect" of that service.³

In this proceeding, Qwest asks the Board to regulate matters that are wholly within the exclusive authority of the FCC (*e.g.*, qualification for the rural exemption (Qwest FFCL No. 22), USF contributions (Qwest FFCL No. 26), numbering resources (Qwest FFCL No. 28), and the LECs' entitlement to assess access charges for terminating *any* traffic to so-called FCSCs (Qwest FFCL No. 20)), or are matters that are impossible or impractical to separate jurisdictionally (*e.g.*, how the LECs structure their relationships with their end-user customers (Qwest FFCL Nos. 9, 11, 23, 30)).

Qwest was not able, either at the hearing or in its post-hearing legal memoranda, to explain why the Board can grant its requested relief as to intrastate traffic without encroaching on the rates, terms, conditions, or regulations applicable to interstate traffic. Nor did Qwest mask its attempt to obtain relief from paying interstate access charges.⁴ As stated above, most of

² *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-69 (1986) ("*Louisiana PSC*").
³ *Vonage Order* at 22414, ¶ 18.

⁴ This exchange at the Hearing demonstrates Qwest's intent:

Board Member Tanner: You recommend the Board prohibit LECs from participating in traffic laundering. Again, if the Board only has intrastate access jurisdiction, how would this resolve the larger problem which also seems to be on the interstate access side?

Qwest Expert Jeffrey Owens: This you could solve both on the interstate and intrastate side because you have control over the telephone numbers that are assigned to the LECs. You also have control over the certification of the LECs in terms of what territories they can serve.

IUB Hearing Transcript at 827:6-17 (emphasis supplied).

Qwest's theories in this case regard matters of exclusive interstate jurisdiction (numbering resources, the rural exemption, and the terms of the NECA Tariff FCC No. 5). In addition, as demonstrated by the amounts of money in controversy, this case is overwhelmingly focused on interstate revenue. Qwest is thus placing the Board in the untenable position of affecting interstate communications in the guise of a state-based access complaint.

At best, the conduct Qwest complains of is jurisdictionally inseparable, which leaves the FCC as the exclusive regulatory authority. Indeed, the FCC is actively considering IXC complaints regarding LEC access charges in Docket 07-135.⁵

At worst, Qwest is simply seeking to collaterally attack the Commission's decisions in *Farmers and Merchants*, *Jefferson*, *Frontier* and *Beehive*. Indeed, Qwest has persuaded the Board that these factually indistinguishable cases are somehow inapplicable, as the Board stated at the decision meeting on August 14. State commissions are not permitted, however, to invalidate the decisions of the FCC. As the Eighth Circuit Court of Appeals has stated, "No collateral attacks on the FCC Order are permitted." *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004) (affirming injunction against agency on grounds of preemption). According to one federal district court, "Congress delegated authority to the FCC to create uniform rules for telecommunications, which, by its very nature, requires consistency amongst the states." *Bennett v. T-Mobile USA, Inc.*, Case No. CV 08-4943 (RSWL), 2008 WL 5622710, *3 (C.D. Cal. Dec. 22, 2008) (dismissing case). Thus, to collaterally challenge the FCC's regulations and the Movants' conformity therewith would "unquestionably trample[] upon the FCC's authority." *Id.* Thus, because the conduct at issue cannot be jurisdictionally parsed and the simple fact that 98% of the traffic before the Board was interstate,

⁵ *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd. 17989 (2007) ("07-135 NPRM").

granting Qwest the relief it seeks could not withstand scrutiny. Movants are therefore likely to succeed on the merits.

Secondly, Movants will suffer irreparable harm if a stay is not granted. See Iowa Code § 17A.19(5)(c). “Unrecoverable” economic loss constitutes irreparable harm. See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674-75 (D.C. Cir. 1985). Similarly, if a party would likely go out of business during the pendency of an action because of the claimed injury, this injury would establish irreparable harm. See *Ahmed v. U.S.*, 47 F. Supp. 2d 389, 400 (W.D.N.Y. 1999) (Store owner’s averment that administrative sanctions would force him out of business was sufficient to establish irreparable harm); *American Cyanamid Co. v. U.S. Surgical Corp.*, 833 F. Supp. 92, 123 (D.Conn. 1992); see also *Maritime Comm’n v. Australia/U.S. Atl. & Gulf Conference*, 337 F. Supp. 1032, 1038 (S.D.N.Y. 1972) (injunction against rate increase was granted although loss could be readily ascertained in terms of money when increase was to be imposed on an ailing industry whose capacity to survive might be affected by sudden economic pressure).

Qwest’s proposed relief will have the effect of eviscerating a significant revenue stream — revenue derived almost exclusively for the work performed in terminating the IXCs’ customers’ interstate traffic — from Movants’ emergent businesses. And although the amounts of terminating access charges that Movants previously have billed to the IXCs can be readily calculated, the amount of traffic Movants would have terminated going forward is entirely speculative. Monetary injury that cannot be calculated with reasonable certainty and that threatens the very existence of Movants’ businesses is by definition irreparable harm. See *Wisconsin Gas*, 758 F.2d at 674-75.

Further, Movants made substantial capital outlays to purchase the switches and to upgrade the facilities necessary to serve their end-user customers that provide conferencing

services. Qwest's proposed relief effectively precludes Movants from ever generating the revenue that justified such investments in the first place. Thus, Movants and similarly situated Iowa LECs face the imminent possibility of exiting the market if Qwest obtains its proposed relief pending the resolution of Movants' Petition before the FCC. Movants will thus suffer irreparable harm if the Board does not stay this proceeding and abstain from issuing a final order.

Third, staying the proceeding will not harm other interested parties. See Iowa Code § 17A.19(5)(c). Issuing a stay will not harm Qwest or the other IXCs who already have withheld the access revenue, both intrastate and interstate, that they believe was billed wrongfully. The IXCs will also continue to collect revenues from their retail long-distance customers who place the calls to the LECs' end-user customers. Accordingly, although the IXCs would still be flouting their obligations under the tariff system and numerous Commission rules and regulations, imposing a stay would still be a winning situation for the IXCs. In addition, the IXCs' customers who have been driving this traffic to the conference service providers will continue to have a viable option to the IXCs' expensive conference-calling service alternatives. Indeed, the only parties who will suffer injury as a result of a stay are the LECs themselves, who will continue to endure the IXCs' theft of their access services pending ultimate resolution of Movants' Petition. The other interested parties, however, will not be harmed if this proceeding is stayed.

Finally, granting a stay weighs heavily in favor of the public interest. See Iowa Code § 17A.19(5)(c). Just as the FCC's Media Bureau recognized in the *Charter Order*, there are no benefits to temporarily complying with an order that the Board had no authority to issue in the first instance. Plainly the public would not be served by the Board's overseeing compliance with an *ultra vires* directive. Further, Movants would be forced to temporarily suspend their

relationships with important end-user customers pending resolution of their Petition, with no guarantee the relationship will resume after the Commission asserts its jurisdictional authority. "The public interest counsels against such waste." *Charter Order*, 22 FCC Rcd. at 13893.

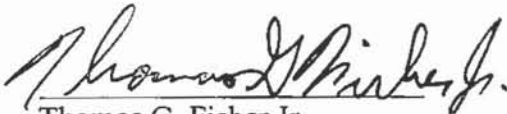
All four tenets of Iowa Code § 17A.19(5)(c), as well as the *Charter Order* factors, are amply met in this case. Each factor strongly supports staying this proceeding pending the FCC's resolution of Movants' Petition. Not only is there a strong likelihood that Movants' requested relief will be granted by the FCC, but the plain absence of harm to the IXC's and the benefit that would inure to the public weigh even more heavily in favor of issuing a stay.

CONCLUSION

For all these reasons, the Board should stay all further proceedings and abstain from issuing a final order pending the FCC's consideration of Movants' Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption.

August 17, 2009

Respectfully submitted,



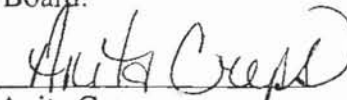
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I hereby certify that I have this 17th day of August, 2009, served the foregoing **GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE MOTION TO STAY PROCEEDINGS** upon each of the following persons as required by the rules of the Iowa Utilities Board:


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**Before the
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In the Matter of Petition for Declaratory Ruling
to the Iowa Utilities Board and
Contingent Petition for Preemption

WC Docket No. 09-____

**PETITION FOR DECLARATORY RULING
TO THE IOWA UTILITIES BOARD
AND
CONTINGENT PETITION FOR PREEMPTION**

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Great Lakes Communications Corp. and Superior Telephone Cooperative (collectively, the "Petitioners"), by their undersigned counsel and pursuant to 47 C.F.R. § 1.2, hereby submit this Petition for Declaratory Ruling to respectfully request a ruling from the Federal Communications Commission ("Commission") that all matters relating to interstate access charges, including the rates therefor and revenue derived therefrom, are within its exclusive federal jurisdiction and thus any attempts by state authorities to regulate interstate access charges are beyond their authority. In addition, as a contingency against an imminent ruling from the Iowa Utilities Board (the "IUB" or "Board", and the "*IUB Order*") that encroaches on the Commission's jurisdiction, Petitioners respectfully request an order preempting such action under the standard for the federal preemption of state actions discussed in *Louisiana Public Service Commission v F.C.C.*¹

I. INTRODUCTION

This Petition seeks to ensure that federal jurisdiction over interstate access will be maintained throughout the resolution of many access-charge related actions across the United States. The case most imminently to be decided is the enforcement action before the IUB entitled *Qwest Communications Corp. v. Superior Telephone Cooperative, et al.*, Docket FCU 07-2. That proceeding, which was initiated on the Complaint of Qwest Communications Corporation ("Qwest"),² seeks to determine the rights of eight local exchange carriers ("LECs") in Iowa to receive intrastate and interstate terminating access charges for telephone calls.

Qwest's complaint was premised on its assertion that the LECs' termination of calls to conference, chat-line, and in some cases, international service providers constituted "traffic pumping" that is somehow unlawful. The Qwest complaint is just one facet of Qwest's unlawful

¹ *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-69 (1986) ("*Louisiana PSC*").

² Docket No. FCU-07-2, Complaint, Request for Declaratory Relief and Request for Emergency Injunctive Relief filed with the Iowa Utilities Board on February 20, 2007.

campaign against competing carriers and conference-service providers — a campaign that includes harassing litigation in venues across the country and unlawful self-help refusals to pay access charges — that Qwest and other large interexchange carriers have been conducting for more than three years.

The IUB seems poised to adopt Qwest's arguments and assertions. In this Petition, Petitioners demonstrate that the *IUB Order* is likely to be flatly inconsistent with the rulings and policies of this Commission in areas where this Commission and federal statutes have occupied the field. The *IUB Order* is also likely to be extraordinarily expansive in scope, given the lengths to which Qwest sought to collaterally attack the Commission's holding and analysis in the *Farmers and Merchants* decision.³ Any order by the IUB that touches, even on a prospective basis, the interstate access rates and revenues of LECs, or the qualification of the LECs for the rural exemption from the benchmark limit under the *CLEC Access Charge Order*,⁴ would be in excess of the IUB's jurisdiction. As demonstrated in this Petition, the IUB is jurisdictionally incapable of regulating any more than a *de minimis* portion of the traffic that is the subject of Qwest's complaint. Further, even for that minuscule amount of intrastate traffic, the IUB must conform its ruling so that the LECs can comply simultaneously with the Commission's rules and regulations as well as the *IUB Order*. The Commission must therefore stand at the ready to preempt any order issued out of the IUB that misreads and ignores established Commission precedent and is *ultra vires*, as all indications seem to suggest the forthcoming *IUB Order* will be.

³ *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd. 17973 (Oct. 2, 2007) ("*Farmers and Merchants*").

⁴ *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 (2001) ("*CLEC Access Charge Order*").

II. THE IUB HAS HELD A PUBLIC DECISION MEETING IN WHICH IT ISSUED SEVERAL FINDINGS THAT REGARD OR DIRECTLY IMPACT INTERSTATE TELECOMMUNICATIONS

The IUB held a decision meeting on August 14, 2009 to announce its preliminary ruling in Docket FCU 07-2 and to outline the content of the *IUB Order*. Ignoring the Commission's holding and analysis in *Farmers and Merchants*, the Board held that the LECs' conference service provider customers were not "end users" under both the LECs' interstate and intrastate tariffs. The Board found, in clear conflict with *Farmers and Merchants*, that calls to conference-calling and chatline bridges did not terminate at the bridge. The Board based this decision on the clearly erroneous belief that the pending Petition for Reconsideration of the *Farmers and Merchants* decision made it not final, and hence not binding on the Board. The Board went so far as to say that it possessed a more comprehensive record than the Commission possessed in *Farmers and Merchants*. The Board also found, in clear conflict with *Jefferson*, *Beehive*, and *Frontier*, which the Board found to be inapplicable, that the sharing of revenue between rural carriers with high access charge rates and chatline or conference-calling providers was unreasonable. The Board even weighed in on the LECs qualifications for the rural exemption under the *CLEC Access Charge Order*. The Board is going to require refunds of access charges to IXC's, yet failed to identify whether intrastate or interstate revenues were to be refunded. The Board is also going to require the LECs to report to the Board how each is using its NXX codes, and return any unused blocks of numbers to NANPA. Clearly, all of these actions greatly exceed the authority of the Board, and step well into the jurisdiction of the Commission.

III. STANDARD FOR GRANTING PETITIONS FOR DECLARATORY RULING

Section 1.2 of the Commission's rules provides that the "Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a

declaratory ruling terminating a controversy or removing uncertainty.” 47 C.F.R. § 1.2. Thus, a declaratory ruling is an appropriate vehicle to restate established law or clarify any perceived uncertainty under existing Commission regulations or precedent.⁵ Where, as here, the subject matter of the petition for declaratory ruling concerns issues over which the Commission has exclusive jurisdiction — *i.e.*, access charges for interstate telecommunications traffic— “the need for agency expertise and for uniformity of decisions” demand that this Commission provide guidance to the courts and state commissions. *Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm’n*, 913 F.2d 305, 310 (6th Cir. 1990). This is particularly the case where the “actions of the state [commission] are necessarily intertwined with federal actions” and the “ultimate issue in this case” is whether the state commission has exceeded its jurisdictional authority. *Id.* at 309-310.

Petitioners file this request in advance of the *IUB Order* on the ground that they would be irreparably harmed, as described below, were any order issued that seeks to nullify or affect their interstate access service. As such, this Petition is not premature or unripe. Federal agencies are not constrained by Article III “case or controversy” limitations, but rather they “may issue a declaratory order in mere anticipation of a controversy or simply to resolve an uncertainty.” *Pfizer, Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999).

IV. ALL ISSUES RELATED TO INTERSTATE ACCESS CHARGES FALL WITHIN THE COMMISSION’S EXCLUSIVE FEDERAL JURISDICTION

Congress granted the Commission exclusive jurisdiction over interstate telecommunications in the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (West 2001). Congress created the Commission

[F]or the purpose of regulating interstate and foreign commerce in communication by wire ... and for the purpose of securing a more

⁵ See *Universal Service Contribution Methodology*, 23 FCC Rcd. 1411, ¶ 1 (2008).

effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication,

Id. § 151. Congress then assigned the matters entrusted to the Commission's jurisdiction:

... [A]ll interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; ...

Id. § 152(a).

The Supreme Court made clear in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930), that matters of interstate communications are entrusted to federal agencies, stating, "The separation of the intrastate and interstate property. . . is essential to the appropriate recognition of the competent governmental authority in each field of regulation." The Commission recently reiterated this well-settled principle:

When a service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission's exclusive jurisdiction.⁶

In the case before the IUB, Qwest and other interexchange carriers ("IXCs") are attacking, directly and indirectly, the rates, terms, revenue derived from and conditions applied to terminating access for such "purely interstate" calls. Were the IUB to adopt this type of relief, it would undeniably encroach upon the FCC's exclusive federal jurisdiction.

⁶ *In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404, 22413 ¶ 17 (2004) ("Vonage Order").

V. THE COMMISSION HAS ALREADY RESOLVED THE ISSUE OF LEC ACCESS CHARGES UNDER IDENTICAL CIRCUMSTANCES: *JEFFERSON, BEEHIVE, FRONTIER, AND FARMERS AND MERCHANTS*

Since the access charge regime was established in 1984, there has been continuous litigation between LECs and IXC's over the rates and volumes of exchange access traffic. The anticipated *IUB Order* at issue in this Petition is part of the most recent bout of access charge litigation.

The current access disputes began in the late 1990s with the advent of "chat-line" services. In December 1996, AT&T filed a Section 208 complaint against Jefferson Telephone Company, a rural ILEC based in Iowa. The Commission denied the AT&T complaint in an Order issued in 2001.⁷ AT&T's complaint was identical to the complaint raised by Qwest in the IUB proceeding: Jefferson Telephone entered into a commercial agreement with International Audiotext Network ("IAN"), a provider of chat-line services. IAN "[marketed] and otherwise [aided] the chatline operations" and Jefferson made payments to IAN "based on the amount of access revenues that Jefferson received for terminating calls to IAN."⁸

AT&T's complaint charged that Jefferson violated § 201(b) of the Communications Act because it "acquired a direct interest in promoting the delivery of calls to specific telephone numbers." AT&T also argued that the "access revenue-sharing arrangement with IAN" was unreasonably discriminatory, in violation of § 202(a) of the Act, because Jefferson did not share revenues with all its customers.⁹ The Commission rejected both these arguments and denied AT&T's complaint.

The following year, the Commission issued two more orders, denying similar complaints by AT&T directed at LECs that shared access revenues with chat-line operators. In *AT&T v.*

⁷ *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001) ("*Jefferson*").

⁸ *Id.* at 16131-2, ¶¶ 2-5.

⁹ *Id.* at 16133, ¶ 5.

Frontier Communications, the Commission rejected AT&T's allegations that "revenue-sharing arrangements" constituted unreasonable discrimination in violation of § 202(a) or violations of the ILECs' common carrier duties under § 201(b).¹⁰ In *AT&T v. Beehive Telephone*,¹¹ the Commission again denied AT&T's complaint against a LEC that engaged in a commercial relationship with a chat-line provider. The *Jefferson*, *Frontier*, and *Beehive* decisions all dealt with exactly the same commercial arrangement that the IXCs characterize as "traffic pumping," despite the fact that it is the IXCs' customers who initiate the traffic. None of these decisions were appealed.

In 2006, the large IXCs developed a new strategy: rather than risk further adverse decisions by filing complaints with the Commission, Qwest, AT&T, Verizon, Sprint and other large IXCs began a coordinated campaign of self-help by simply refusing to pay the access charges billed by rural LECs. This forced the LECs to initiate collection actions in federal district court, and to incur the costs and delay associated with federal court litigation. In some cases, the IXCs filed complaints against the LECs in federal court, in an exercise of forum shopping in anticipation of collection actions. Of course, these complaints also had the effect of imposing legal costs on the LECs. In so doing, the IXCs imposed a "cost/price squeeze" on these rural carriers in two ways: they withheld payment of lawful access charges in an unlawful campaign of self-help, while imposing costs on the LECs by forcing them to defend harassing and meritless litigation. As a result of this coordinated campaign by the large IXCs — which has now been proceeding for over three years — they have succeeded in preventing some LECs from building out their networks to serve their rural communities, have caused other LECs to lay off

¹⁰ *AT&T Corp. v. Frontier Commc'ns of Mt. Pulaski, Inc.*, 17 FCC Rcd. 4041, 4142, ¶¶ 1, 2 (2002) ("*Frontier*").

¹¹ *AT&T v. Beehive Tel. Co.*, 17 FCC Rcd. 11641 (2002) ("*Beehive*").

employees, and in some cases, have driven LECs or chat and conference operators out of business.

In the most recent Commission case regarding terminating access, Qwest filed with this Commission a formal complaint on May 2, 2007, against Farmers and Merchants Mutual Telephone Company ("Farmers"), an Iowa LEC that Qwest accused of "traffic pumping." Qwest asserted that it had no obligation to pay the LEC's invoiced access charges. In late 2007, the Commission rejected Qwest's arguments. Though the Commission did agree with Qwest that, as a rate-of-return carrier, Farmers may have over-earned, it rejected all of Qwest's other arguments, and found that:

- Farmers did not violate Sections 203 or 201(b) of the Act by imposing terminating access charges on traffic bound for conference calling companies.¹²
- The Farmers' tariff allows Farmers to assess terminating access charges on calls to conference calling companies.¹³
- Conference calling companies are end users as defined in Farmers' tariff, and access charges have been properly imposed under that tariff.¹⁴
- Farmers' payment of marketing fees to the conference calling companies does not alter their status as end users under Farmers' tariff. In addition, whether the conference calling companies paid Farmers more than Farmers paid them is irrelevant.¹⁵
- Qwest failed to prove that the conference calling company-bound calls do not terminate in Farmers' exchange. Qwest also failed to prove that Farmers' imposition of terminating access charges was inconsistent with its tariff.¹⁶
- Farmers' tariffed rates were "deemed lawful" and so the LEC was not responsible for making refunds.¹⁷

Qwest filed a Petition for Reconsideration of the *Farmers and Merchants* decision more than 16 months ago, which the Commission is still apparently considering.

¹² *Farmers and Merchants Order* at 17985, ¶ 30.

¹³ *Id.* at 17987, ¶ 35.

¹⁴ *Id.*

¹⁵ *Id.* at 17987, ¶ 38.

¹⁶ *Id.* at 17987, ¶ 39.

¹⁷ *Farmers and Merchants Order* at 19983-84, ¶ 27.

There are now at least 17 federal court cases pending in district courts across the country reviewing the continuing refusal of IXCs to pay for the access services provided by rural LECs for terminating the IXCs' customers' calls to conferencing service providers.¹⁸ The Federal District Court for the Southern District of New York recently referred an issue from a pending access charge collection action to the Commission – AT&T's claim that commercial relationships between LECs and chat/conference operators constitute a "sham" arrangement that voids the LECs' tariffs.¹⁹ Petitioners understand that a second referral of issues from a collection action/"traffic pumping" complaint proceeding was made by the Federal District Court of Minnesota on July 15, 2009.²⁰ Finally, three other actions involving the same issues are pending before the Federal District Court for the Southern District of Iowa.²¹ These three cases involve three IXCs — Qwest, AT&T and Sprint — and several rural LECs. The parties in that case all acknowledged that the Commission's decision in the *Farmers and Merchants* case is directly relevant to their claims and/or defenses.

The Commission has incorporated all of the issues associated with the IXCs' "traffic pumping" complaints into a pending rulemaking proceeding in WC Docket No. 07-135. In two rounds of comments and numerous *ex parte* presentations, Qwest, AT&T, Verizon, Sprint and other IXCs have reiterated every argument they have made against LEC commercial agreements

¹⁸ See *Petition for Declaratory Ruling of All American Telephone Co., Inc., v. Pinnacle Communications, Inc., and ChaseCom to Reconfirm that Local Exchange Carrier Commercial Agreements with Providers of Conferencing, "Chat Line" and Other Services Do Not Violate the Communications Act*, filed with the Commission on May 20, 2009. In that Petition, and subsequent Answer, the three Petitioner LECs list 17 federal district court actions pending in Iowa, South Dakota, New York and Minnesota, all dealing with "traffic pumping" allegations, and demands for payment of access charges. The Commission has not yet put that Petition out for public comment, and has not assigned a docket number to the proceeding.

¹⁹ *Id.*; see also File No. EB-09-MDIC-0003, Informal Complaint of AT&T (April 20, 2009).

²⁰ *Tekstar Communications, Inc. v. Sprint Communications Co., L.P.*, Case No. 0:08-cv-01130 (D. Minn. April 23, 2008).

²¹ *AT&T Corp. v. Superior Telephone Cooperative, et al.*, Docket No. 4:07-cv-00043 (S.D. Iowa Jan. 29, 2007); *Qwest Communications Corp. v. Superior Telephone Cooperative, et al.*, Docket No. 4:07-cv-00078 (S.D. Iowa Feb. 20, 2007); *Sprint Communications Company, L.P. v. Superior Telephone Cooperative, et al.*, Docket No. 4:07-cv-00194 (S.D. Iowa May 7, 2007).

with chat/conference/international operators in past proceedings before this commission, before the federal district courts, and before the Iowa Utilities Board.

Unfortunately, the Commission's use of party-specific complaint proceedings to address access charge issues related to chat-line and conference traffic over the last decade has not dissuaded the IXCs from a continual resort to self-help tactics. Because the final orders in the *Jefferson*, *Frontier*, *Beehive* and *Farmers and Merchants* cases came from adjudicatory proceedings, the IXCs have argued that minor changes in the underlying facts of the cases, or the legal theories raised by the IXCs, render those decisions inapposite. Nothing demonstrates this more clearly than Qwest's Proposed Findings of Fact and Conclusions of Law ("Qwest FFCL") in the IUB proceeding.²²

VI. QWEST'S PROPOSED RELIEF IN THE IUB PROCEEDING IS AN INVITATION TO USURP THE COMMISSION'S AUTHORITY OVER INTERSTATE TELECOMMUNICATIONS

Qwest seeks relief from the IUB that would be comical in its jurisdictional overreach but for the fact that the Board appears receptive to Qwest's invitation to usurp this Commission's exclusive authority to regulate interstate telecommunications. As Qwest noted, "[a]t numerous times throughout [the IUB proceeding], the LEC Respondents have argued that the Board is without jurisdiction to hear or decide the issues involved. Each time, the Board has rejected the arguments, and stated that 'the Board has jurisdiction to hear all of these issues.' July 3, 2007 Order at 5."²³

²² Petitioners are constrained from appending Qwest's FFCL or post-hearing briefs, because Qwest has asserted confidentiality over some portions of these documents. Though Petitioners are confident that the portions of these papers quoted or paraphrased herein are not confidential, caution dictates that the papers themselves not be appended.

²³ Qwest FFCL at 3.

**A. THE QWEST PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
ILLUSTRATE THE JURISDICTIONAL OVERREACH OF THE IUB**

These “issues” that the Board believes are within its jurisdiction include the following, as taken from the Qwest FFCL:

- Whether FCSCs [Qwest’s acronym for conference service providers] are wholesalers or carriers, not end-users, and therefore calls delivered to FCSCs are not subject to interstate and intrastate switched access charges. Qwest FFCL No. 9.
- Whether end users must either own, lease, or control a building or buildings (or defined portions of a “building or buildings,” which necessarily requires a lease or ownership) to become an end-user premises under the access tariffs. Qwest FFCL No. 11.
- Whether the LEC Respondents terminated any of the international calling, credit-card calling or pre-recorded playback calling at issue in this case. Qwest FFCL No. 13.
- Whether Great Lakes is entitled to intrastate or interstate switched access charges for *any* of its calls. Qwest FFCL No. 18.
- Whether LECs are entitled to *any* compensation for the calls delivered to numbers associated with FCSCs on the grounds that such calls are beyond the scope of the interstate and intrastate switched access tariffs. Qwest FFCL No. 20.
- Whether the sharing of interstate and intrastate access revenue is an unjust and unreasonable practice. Qwest FFCL No. 21.
- Whether it is an unjust and unreasonable practice for CLECs involved in “traffic pumping” to claim the rural carrier exemption from the benchmark limit under the *CLEC Access Charge Order*. Qwest FFCL No. 22.
- Whether the arrangements between the LEC Respondents and the FCSCs to obtain and share interstate and intrastate access revenues from long distance carriers through the offering of free calling services constitute unjust and unreasonable practices and constitute violations of the public interest and the LEC Respondents’ certifications. Qwest FFCL No. 23.
- Whether Great Lakes failed to satisfy the rural carrier exemption from the benchmark limit under the *CLEC Access Charge Order*. Qwest FFCL No. 24.
- Whether “traffic pumping” is an unjust and unreasonable practice because it abuses numbering resources. Qwest FFCL No. 28.
- Whether LECs must immediately cease and desist sharing interstate and intrastate access revenues with FCSCs and immediately disconnect the telephone numbers associated with such services. Qwest FFCL No. 30.

- Whether LECs must immediately cease billing IXCs such as Qwest for interstate and intrastate switched access fees on FCSC traffic. Qwest FFCL No. 31.²⁴
- Whether the Board's decision should be considered to be binding precedent that the Board intends to follow in any future "traffic pumping" cases. Qwest FFCL No. 36.

Each of Qwest's proposed findings of fact and conclusions of law listed above is plainly beyond the IUB's jurisdiction. But after the Commission ruled against Qwest in the *Farmers and Merchants* case, there can be no doubt that Qwest is seeking another bite at the apple.²⁵

Qwest argued to the Board that:

The LEC Respondents also rely upon *AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd. 16130 (2001), and claim this decision and its progeny show the FCC has already found traffic pumping schemes are legal. The cases do not stand for the propositions cited by the LEC Respondents. . . The LEC Respondents arguments [sic] attempt to read more into the [Jefferson] decision than exists. No matter how many times the LECs say "*Jefferson*" and "*Farmers and Merchants*" it does not change the unalterable fact that these decisions do not help them in the slightest.²⁶

To the contrary, *Jefferson* and *Farmers and Merchants* are dispositive in favor of Petitioners.

Sprint even went a step further at the hearing and stated that the IUB effectively has the authority to reverse the Commission's holding in *Farmers and Merchants*: "[T]herefore we don't know what [the Commission is] going to say, so [the *Farmers and Merchants*] order couldn't possibly be the final answer, which is what we're asking this Board to do for us."²⁷

Thus, despite a decade of consistent rulings on exactly the same fact patterns — rural LECs' collection of access charges for calls made to chat and conference service operators —

²⁴ Qwest did not seek to hide that it is asking the Board to regulate the rates of the LEC Respondents. When asked whether the rate levels themselves were being challenged, Qwest's expert witness, Jeffrey Owens, stated that Qwest was asking the Board to make a determination that the LECs did not qualify for the rural exemption and accordingly be required to mirror the ILECs' rates, "so in that sense Qwest is addressing the rates in this proceeding." IUB Hearing Transcript at 568:5-16. All excerpts from this transcript are public, non-confidential documents and are appended as **Exhibit A** to this Petition.

²⁵ Qwest's expert witness, Jeffrey Owens, opined that "the whole question in this proceeding is does that tariff, that *interstate* tariff, apply to the traffic that Qwest has delivered to the LECs[.]" IUB Hearing Transcript at 612:25-613:2 (emphasis added).

²⁶ Qwest FFCL at 30.

²⁷ Testimony of James Appleby (Sprint), IUB Hearing Transcript at 1809:14-17.

that have consistently ruled in favor of LECs, the IXC's are contending that the FCC decisions do not matter because they come out of party-specific adjudicatory proceedings. The IUB appears poised to adopt these arguments and attempt to fill this perceived void by creating its own law on the matter, in complete disregard of Commission precedent. Unless preempted, this would have the effect of overturning the Commission's rulings in *Jefferson*, *Frontier*, *Beehive* and *Farmers and Merchants* as they apply to interstate traffic exchanged in Iowa, and would pre-judge issues now under active consideration by the Commission in at least one currently docketed rulemaking proceeding.

B. QWEST SEEKS A RULING FROM THE IUB THAT WOULD EXCEED THE IUB'S JURISDICTION IN OTHER WAYS

1. International and VoIP Calls Are Within the Exclusive Jurisdiction of the Federal Communications Commission

Qwest expressly seeks a determination from the IUB that terminating switched access charges cannot apply to conference calls made using Internet-protocol based calling cards, or to calls that are routed to overseas numbers. Qwest FFCL No. 13. The impropriety of such a ruling is clear on its face. Under the Communications Act of 1934, the Commission is vested with exclusive jurisdiction over interstate and international traffic. 47 U.S.C. § 152. Moreover, the Commission has on multiple occasions asserted exclusive jurisdiction over Internet-based communications,²⁸ including IP-based calling card calls.²⁹

2. The IUB Has No Authority to Regulate the Use of Numbering Resources

Qwest also invites the IUB to find that "traffic pumping" is unreasonable because it "abuses numbering resources." Qwest FFCL No. 28. The Commission has exclusive jurisdiction over numbering resources, and this issue falls within its exclusive authority. 47

²⁸ *Vonage Order*, 19 FCC Rcd. 22404 (2004).

²⁹ *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826 (2005).

U.S.C. § 251(e)(1) (“The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.”) The appropriate way for a state regulatory authority to address numbering-resource concerns is to petition the Commission for delegated authority, which the IUB has not done.³⁰

Given the pendency of at least 17 different federal court actions in at least four different districts, and the multiple referrals to this Commission, it is apparent that the issues involving rural LEC commercial agreements with conference and chat-line operators are of nationwide importance. The Commission must provide the national guidance that the courts, state regulators and the industry require. In order to provide such guidance, the Commission should declare that the rates for, terms of, and revenue derived from interstate access service are within its exclusive jurisdiction, and that any contrary order from the IUB is preempted.

C. THE BOARD’S PREVIOUS ORDERS IN DOCKET FCU 07-2 DO NOT DISPLAY A CLEAR DELINEATION BETWEEN INTRASTATE AND INTERSTATE JURISDICTION

The Board’s handling of several jurisdictional challenges in docket FCU 07-2 seems to indicate that it is willing to consider, and possibly resolve, matters that fall within the Commission’s exclusive interstate jurisdiction. Several parties filed motions to dismiss based on the *de minimis* volume of intrastate traffic in dispute and Qwest’s lack of standing to pursue discrimination claims.³¹ In denying these motions, the Board stated it was “aware of its

³⁰ *Numbering Resource Optimization*, 15 FCC Rcd 7574, ¶ 7 (2000).

³¹ The scope of the IUB’s authority is narrowly circumscribed by its enabling statute, much more so than other state regulatory bodies. Specifically, it cannot regulate the rates for services provided by the Petitioners, or by the other LECs that were the subject of its complaint action in Docket No. FCU-07-2. Iowa Code § 476.1 states that “mutual telephone companies in which at least fifty percent of users are owners, co-operative telephone corporations or associations [and] telephone companies having less than fifteen thousand customers and less than fifteen thousand access lines . . . are not subject to the rate regulations provided for in this chapter.” All of the Petitioners meet these statutory criteria.

Of course, the effect of the Qwest’s proposed relief is to regulate the LECs’ rates if the IUB orders the LECs to refund the access fees they have collected from Qwest and the other IXCs to date, and prohibits them from collecting their tariffed access charges in the future. In so doing the IUB will have set a rate of zero for the services that the LECs provide to the IXCs in terminating the traffic at issue. See *Advantel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 687 (E.D. Va. 2000) (finding that, if the tariffed rate does not apply to the collection of access charges, the IXC “will have received millions of dollars of services for free – surely, a result antithetical to the filed-

jurisdictional limits with respect to interstate and international traffic,”³² but still allowed Qwest to proceed on all its claims. Several parties then sought to limit the scope of discovery to only matters related to intrastate matters and sought protection against the discovery of issues related to the terms, conditions, rates or revenues associated with interstate communications. These motions were denied again by the Board.³³ Again, according to Qwest, “[a]t numerous times throughout [the IUB proceeding], the LEC Respondents have argued that the Board is without jurisdiction to hear or decide the issues involved. Each time, the Board has rejected the arguments, and stated that ‘the Board has jurisdiction to hear all of these issues.’ July 3, 2007 Order at 5.”³⁴

At the Hearing itself, the Board seemed to acknowledge its jurisdictional limitations, but nonetheless asked Qwest how it can issue an order regarding interstate access:

Board Member Tanner: You recommend the Board prohibit LECs from participating in traffic laundering. Again, if the Board only has intrastate access jurisdiction, how would this resolve the larger problem which also seems to be on the **interstate access side**?

Qwest Expert Jeffrey Owens: **This you could solve both on the interstate and intrastate side** because you have control over the telephone numbers that are assigned to the LECs. You also have control over the certification of the LECs in terms of what territories they can serve.

IUB Hearing Transcript at 827:6-17 (emphasis supplied).

rate doctrine.”). But because Qwest is not willing to admit this fact, it establishes the fiction that it is merely regulating the “terms and conditions of service” to prevent “discrimination,” a claim Qwest is wholly without standing to raise.

³² Order Docketing Complaint, Setting Procedural Schedule, Denying Motion for Summary Judgment, Denying Motions to Dismiss, Denying Motion to Defer Discovery, and Denying Cross-Motion For Emergency Evidentiary Hearing at 12 (May 25, 2007). All Orders issued by the IUB and referenced herein are public and non-confidential documents and are appended as **Exhibit B** to this Petition.

³³ Order Denying Motion to Dismiss Moot Complaint, Granting Supplemental Motion to Compel, Denying Motion for Reconsideration, Granting Motion to Extend Hearing, and Setting Hearing, and Setting Amended Procedural Schedule (July 3, 2007).

³⁴ Qwest FFCL at 3.

When questioned a short time later by Qwest's counsel on redirect examination, Mr. Owens made clear that Qwest's strategy throughout the proceeding was to enable the Board to exercise authority over telecommunications regardless of its jurisdictional classification:

Q. I would like to start on redirect with some questions from today's — specifically a question asked by Board Member Krista Tanner, and she said what ability, if any, does this Board have to prevent revenue sharing at both the intra and interstate levels, and you contemplated it was intrastate only. Do you recall that?

A. Correct.

Q. Does the Board have the ability to prevent discrimination of all types?

A. I believe the rules of the Iowa Board give it that authority, yes.

Q. Does the concept of revenue sharing, as we have in this case, contain facts where the local exchange carrier defendants are using **revenues from the interstate access regime** to provide kickbacks to their free calling partners?

A. **In every instance, yes.**

Q. And given the Board has jurisdiction over discrimination, have you rethought your answer to Board Member Tanner?

A. Yes. **One additional tool the Board has** to consider the issues in this case is if it determines that the LECs are discriminating amongst customers in Iowa by giving — sharing switched access charges with some parties, but not others, because of the use of switched access charges with some parties, but not others, because of the use of switched access services to facilitate that discrimination, then it could order that such discrimination cease, which would prevent the LECs from using their interstate tariffs in that manner. So another way of putting it, they're using the **interstate tariff** to facilitate discrimination.

IUB Hearing Transcript at 837:8-838:18 (emphasis supplied).

Taken together these instances display a posture hostile towards the well-settled bounds of state commission jurisdiction. Though in each case the Board acknowledged "its jurisdictional limits with respect to interstate and international traffic," it nonetheless permitted this case to proceed on Qwest's attempts to enforce the tenets of federal telecommunications regulations and to invalidate federal access tariffs. Based on this history of the case, Petitioners

seek a reiteration of the restrictions on state agencies to resolve matters regarding terms, conditions, rates or revenues associated with interstate and international communications.

VII. ANY ACTION BY THE IUB RELATED TO INTERSTATE OR INTRASTATE ACCESS WOULD MERIT PREEMPTION UNDER THE LOUISIANA PSC TEST

The jurisprudence on the Commission's interstate jurisdiction being so clear, Petitioners respectfully request a ruling that any action by the IUB impinging on the rates, terms, or revenue derived from interstate or intrastate service is preempted. The bounds of federal jurisdiction to supplant state law were articulated by the Supreme Court in the *Louisiana PSC* case:

The Supremacy Clause of Article VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), when there is outright or actual conflict between federal and state law, e.g., *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).³⁵

The Commission itself has noted that: "It is well-established that '[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations.'"³⁶

³⁵ *Louisiana PSC*, 476 U.S. 355 at 368-69.

³⁶ *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd. 15168, 15172, ¶ 8 (2000) (citing *Fidelity Federal Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982)).

The Commission has used this authority consistently to prevent the erosion of its jurisdiction, to implement its rules and policies on a nationwide basis, and to implement the mandates of the Communications Act.³⁷ Section 253 of the Communications Act, as amended by the Telecommunications Act of 1996, provides the Commission with express authority to preempt state regulations that “prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253. In addition, the Commission has found implied preemption authority in other sections of the Act, including Sections 154(i) and 251.³⁸

As Petitioners demonstrate below, any IUB order that grants Qwest any of the relief it seeks would merit preemption under all the provisions of the *Louisiana PSC* test. Such an order would: (1) constitute a barrier to the competitive provision of both interstate and intrastate services, in contravention of § 253 of the Act; (2) directly contradict statements of law and policy established by this Commission; (3) make it impossible to comply with federal law and the IUB’s decision; (4) effectively attempt to preempt Commission authority, ignoring the fact that the Commission has occupied the field by establishing rulemaking proceedings that are actively considering identical issues; and (5) is a direct impediment to the rules and policies established by this Commission.

A. CONGRESS HAS EXPRESSED A CLEAR INTENT TO PREEMPT STATE ACTIONS THAT RESTRICT COMPETITION

Section 253 of the federal Communications Act provides for the “Removal of Barriers to Entry.” This section of the Act states:

³⁷ E.g., *Vonage Holdings Corp.*, 19 FCC Rcd. 22404 (2004); *Petition for a Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc. and Ryder Communications, Inc.*, 8 FCC Rcd. 698 (1993), *aff’d* 10 FCC Rcd. 4153 (1995).

³⁸ See *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, 20 FCC Rcd. 6830, 6839, ¶ 19 (2005).

[253](a) IN GENERAL. — No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

* * *

(b) STATE REGULATORY AUTHORITY. — Nothing in this section shall affect the ability of a State to impose, on a competitive neutral basis . . . requirements necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

* * *

(d) PREEMPTION. — If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such a violation or inconsistency.

As discussed below, the relief that Qwest seeks would restrict both intrastate and interstate competition in multiple respects, and so falls within the express Congressional preemption mandate.

Qwest asks the Board to revoke the certificate Great Lakes on the grounds that they have engaged in unreasonable conduct. Qwest FFCL No. 26. Specifically, Qwest seeks to de-certify Great Lakes on the ground, among others, that it enters into contractual arrangements with conference and chat-line operators and shares access revenues with them. Qwest can cite to no Commission precedent to support this finding, and there is none. In fact, as discussed above, the Commission on four separate occasions — in its *Jefferson*, *Frontier*, *Beehive*, and *Farmers and Merchants* decisions — has rejected identical Qwest and AT&T arguments against identical conduct. Therefore, with respect to interstate access traffic at a minimum, the IUB has neither the jurisdiction nor the grounds to seek revocation of the LECs' certifications.

Any attempt by the IUB to decertify the LECs on the grounds of providing service to conference-calling and chat-line service providers must fail because the statutory standards that apply under both the Iowa Code and the federal Communications Act are essentially identical

and the Commission has found such conduct to be lawful. The regulatory standard promulgated in Section 476.3 of the Iowa Code states: "When the board, after a hearing held after reasonable notice, finds a public utility's rates, charges, schedules, service, or regulations are unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law, the board shall determine just, reasonable, and nondiscriminatory rates, charges, schedules, service, or regulations to be observed and enforced." This standard is essentially the same as the test under which the Commission evaluated the complaints in its four decisions dealing with conference calling and chat-line traffic. Section 201(b) of the Communications Act states that: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful[.]" Therefore, since the standards are the same, if the LECs' conduct is lawful under federal law, it is necessarily lawful under Iowa state law.

The IUB's potential de-certification would directly prevent these two CLECs from providing intrastate service, and would force them out of the local Iowa market. In so doing, this action "prohibit[s] . . . the ability of [the CLECs] to provide any . . . intrastate telecommunications service" and so contravenes Section 253(a) of the Act.

B. QWEST'S PROPOSED RELIEF PRESENTS AN OUTRIGHT AND ACTUAL CONFLICT WITH ESTABLISHED FEDERAL LAW

Qwest asks the Board to expressly find that four seminal Commission decisions regarding issues that are identical to those under consideration in Iowa Docket FCU-07-2 are "inapposite" and to be ignored.³⁹ The IUB, however, is required to follow all of the Commission's decisions,

³⁹ Qwest FFCL at 30. In addition, Qwest's post-hearing brief flatly instructs the Board to "ignore" the *Farmers and Merchants Order*.

including the *Farmers and Merchants* decision. Thus, were it to grant Qwest's requested relief, the Board will contravene prevailing federal law.

1. Qwest's requested relief would require the Board to flout the Commission's orders governing interstate terminating access.

The Board cannot render a decision that ignores or violates the Commission's clear holding in *Farmers and Merchants* that traffic to any entity satisfying the NECA definition of "end user" and "customer" is compensable for terminating access. That *Farmers and Merchants* is the subject of a Petition for Reconsideration makes no difference. Section 1.106(n) of the Commission's Rules makes clear that reconsideration requests do not stay the effect of a Commission order:

Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof.

Of course, neither the IUB nor Qwest has received such a special order from this Commission, and the *Farmers and Merchants* decision is binding law on the facts of this case.

Qwest asks the Board to find that the Commission's decisions in *Jefferson*, *Frontier*, and *Beehive*, as well as *Farmers and Merchants*, are all inapposite because they were the result of party-specific adjudications and were narrowly decided on the facts of the individual cases. This invitation is wholly improper on two counts: First, the Commission routinely uses the formal complaint process to establish precedent that controls the conduct of other carriers in similar circumstances. The *Jefferson*, *Frontier*, *Beehive* and *Farmers and Merchants* cases addressed exactly the same traffic that is the subject of the IUB FCU-07-2 docket — calls terminating to conference and/or chat-line operators. Those cases challenged exactly the same conduct — commercial agreements in which LECs shared interstate and intrastate access revenues. And the IXCs in those cases sought exactly the same relief — refunds of access charges paid, and

absolution from the obligation to pay the tariffed rates in the future. In fact, the *Frontier* decision is only a single paragraph followed by two ordering paragraphs. The Commission needed only two sentences to dismiss AT&T's complaint:

The issues raised in this Complaint are identical to those raised and denied in *AT&T Corp. v. Jefferson Telephone Co.* Thus, for reasons explained therein, we conclude that AT&T has failed to meet its burden of demonstrating that Defendants violated either section 202(a) or section 201(b) of the Act, and therefore deny AT&T's complaint in its entirety.⁴⁰

These cases establish a body of law that constitutes *stare decisis*, and binds the IUB to apply that law to the facts in this case as a matter of federal law.

2. Qwest seeks to prohibit revenue sharing by carriers which stifles both intrastate and interstate competition.

Qwest is requesting a ruling from the IUB that prohibits all sharing of access revenue, including interstate revenue, between LECs and conference calling companies. Qwest FFCL Nos. 23, 30. Qwest does not attempt to differentiate between revenue sharing arrangements for intrastate and interstate services, and of course such jurisdictional parsing is impossible.

Any such prohibition of revenue sharing directly contradicts established Commission policy. In fact, the Commission has found that revenue sharing benefits the public by allowing the introduction of new, innovative services, and provides revenue options for startup companies that may otherwise not be able to enter the market to compete. This policy is most broadly stated in the Commission's treatment of business relationships between LECs that provide DSL and other wireline broadband services and independent Internet service providers ("ISPs"):

The record demonstrates that allowing non-common carriage arrangements for wireline broadband transmission will best enable facilities-based wireline broadband Internet access service providers, particularly incumbent LECs, to embrace a market-based approach to their business relationships with ISPs, providing the flexibility and freedom to enter into mutually beneficial commercial arrangements with particular ISPs.

⁴⁰ *Jefferson*, 16 FCC Rcd. at 16131, ¶ 1 (citations omitted).

* * *

Non-common carriage contracts will permit ISPs to enter into various types of compensation arrangements for their wireline broadband Internet access transmission needs that may better accommodate their individual market circumstances. For example, ISPs and facilities-based carriers could experiment with revenue-sharing arrangements or other types of compensation-based arrangements keyed to the ISPs' marketplace performance, enabling the ISPs to avoid a fixed monthly recurring charge (as is typical with tariffed offerings) for their transmission needs during start-up periods. . . . Moreover, it encourages other types of commercial arrangements with ISPs, reflecting business models based on risk sharing such as joint ventures or partnership-type arrangements, where each party brings their added value, benefiting both the consumer (through the ability to obtain a new innovative service) and each party to the commercial arrangement.⁴¹

Because a ban on revenue sharing would discourage innovation and restrict competition for both intrastate and interstate services, the ban would run afoul of Commission precedent.

Moreover, the question of sharing the revenues derived from services identical to those in the case before the IUB was more recently discussed in the *Farmers and Merchants* case, and the Commission again refused to find that such conduct is in any way improper. Nor did the FCC accept Qwest's argument that revenue-sharing arrangements disqualify an entity from being an end user under applicable tariffs. The FCC knew in that case that the LEC shared revenue with its conference service provider customers, and unequivocally stated that "Farmers' payment of marketing fees to the conference calling companies does not affect their status as end users, for purposes of Farmers' tariff." *Farmers and Merchants*, 22 FCC Rcd. at 17987-88, ¶ 38. Were the IUB now to hold that any Petitioner should be deprived of terminating access because it shared revenue with a conference call or chat line provider, it would directly contravene settled federal precedent.

Secondly, the IUB is poised to reach specific conclusions that are diametrically opposed to the Commission's findings on identical facts. The chart below summarizes these direct

⁴¹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, 14899-900, ¶¶ 87-88 (2005) (footnotes omitted) ("*Broadband Internet Access Order*").

conflicts with Commission precedent. In cases where the *Jefferson*, *Frontier*, *Beehive* and *Farmers and Merchants* all stand for the proposition, we refer to the “four cases.”

REQUEST TO IUB	OPPOSING FEDERAL PRECEDENT
FCSCs are not End Users of the LECs. Qwest FFCL No. 9.	Directly contravenes the <i>Farmers and Merchants</i> decision, interpreting identical tariff language. 22 FCC Rcd. at 17987, ¶ 38. ⁴²
FCSCs do not purchase local exchange service from LECs. Qwest FFCL No. 2.	Directly contravenes the <i>Farmers and Merchants</i> decision, interpreting identical tariff language. 22 FCC Rcd. at 17987, ¶ 38.
FCSCs are business partners of LECs. Qwest FFCL No. 8.	Directly contravenes the <i>Farmers and Merchants</i> decision, interpreting identical tariff language. 22 FCC Rcd. at 17987, ¶ 38.
LECs never netted access payments for local exchange service with FCSCs. Qwest FFCL No. 5.	<i>Farmers and Merchants</i> finds that payment of money is not relevant. 22 FCC Rcd. at 17987, ¶ 38.
No FCSC calls were terminated to an End User’s premises. Qwest FFCL No. 10.	Directly contravenes the <i>Farmers and Merchants</i> decision, interpreting identical tariff language. 22 FCC Rcd. at 17986,

⁴² Paragraph 38 of *Farmers and Merchants* states:

38. We find that Farmers’ payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers’ tariff. Qwest offers scant support for its assertion that one cannot subscribe to a service without making a net payment to the service provider. For this pivotal proposition, Qwest cites nothing in the tariff itself, but only Black’s Law Dictionary’s definition of “subscription” as a “written contract by which one engages to ... contribute a sum of money for a designated purpose ... in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like.” Another dictionary, however, defines “subscribe” as merely “to enter one’s name for a publication or service,” and we note that offers of “free subscriptions” are quite common. We reject Qwest’s premise that the conference calling companies can be end users under the tariff only if they made net payments to Farmers. The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users. The record shows that the conference calling companies did subscribe, *i.e.*, enter their names for, Farmers’ tariffed services. Thus, the conference calling companies are both customers and end users, and Farmers’ tariff therefore allows Farmers to charge terminating access charges for calls terminated to the conference calling companies.

Farmers and Merchants, 22 FCC Rcd at 17987, ¶ 38 (2007) (citations omitted).

REQUEST TO IUB	OPPOSING FEDERAL PRECEDENT
	¶¶ 33-34.
The services that LECs provided to FCSCs was not tariffed access service, it was private carriage. Qwest FFCL Nos. 9, 12.	The Commission found that the identical services were tariffed access services in all of the four cases.
"Traffic Pumping" is <i>per se</i> unjust and unreasonable. Qwest FFCL Nos. 28-29.	Because "Traffic Pumping," as defined by the IXC's is identical to the conduct reviewed, and found not to be unlawful, by the Commission in the four cases, the IUB is prohibited from establishing a <i>per se</i> rule against it.
Revenue sharing is an unjust and unreasonable practice. Qwest FFCL No. 21.	The Commission expressly rejected identical claims in all four cases and in <i>Broadband Internet Access Order</i> , 20 FCC Rcd. at 14899-900.

C. IT WOULD BE IMPOSSIBLE TO COMPLY WITH ESTABLISHED FCC PRECEDENT AND THE ORDER THAT QWEST IS SEEKING

Qwest's pleadings to the IUB in Docket FCU 07-2 do not even attempt to distinguish between intrastate traffic and interstate traffic,⁴³ and, as noted above, the Board has validated this approach throughout the proceeding. Qwest asks for a ruling that reaches broadly to any LEC that terminates calls to conference, chat or international operators, regardless of the jurisdictional classification of those calls. This is not surprising because it is physically impossible to differentiate between the handling of intrastate and interstate calls to bridges located in Iowa.

Qwest seeks relief that would target a LEC's actions and behavior that cannot be parsed by jurisdiction. Any findings by the IUB regarding sharing of revenues between LECs and FCSCs, the ownership and placement of the service bridges, the payment of tariffed services by FCSCs are actions that are impossible to break down into "intrastate" and "interstate"

⁴³ Qwest's witness proffered to address the amount of access charges at issue in the IUB proceeding, Anne Hilton, was asked "[a]s far as you know, has there been a separate figure computed solely for the intrastate costs incurred by Qwest in this case? A. Not to my knowledge." IUB Hearing Transcript at 1427:17-20.

components. By definition, the IUB's attempt to regulate actions and behavior encroaches on conduct within this Commission's purview, making "compliance with both federal and state law ... in effect physically impossible."⁴⁴

Any decision by the IUB will be premised on its interpretation of the terms of Petitioners' federal tariffs, including "end users," "premises," and "buildings." These are precisely the same terms, used identically, in the federal tariffs that this Commission has interpreted in its *Farmers and Merchants*, *Jefferson*, *Frontier*, and *Beehive* decisions. Neither Qwest nor the IUB can explain how identical language can be interpreted differently in federal and state tariffs, and of course, it cannot be. Because the state tariff language at issue is identical to the federal tariff language, and complying with both federal and state law using opposing interpretations of the same language is "in effect physically impossible" under the *Louisiana PSC* test. For these reasons, a contrary decision issued out of the IUB cannot co-exist with established FCC rulings, and is inimical to the rules and policies set by the FCC. As such, the standards for preemption are met, and the *IUB Order* must be preempted.

D. THE FEDERAL COMMUNICATIONS COMMISSION HAS OCCUPIED THE FIELD OF LEC ACCESS CHARGES, REGARDING BOTH CURRENT LAW AND POTENTIAL PROSPECTIVE CHANGES TO THAT LAW

On October 2, 2007, this Commission issued a Notice of Proposed Rulemaking ("NPRM") in Docket 07-135, specifically to address IXC complaints associated with their "traffic pumping" allegations.⁴⁵ The NPRM established a broad inquiry into the allegations of unlawful access stimulation, and proposed the following items for comment:

- Whether new rules must be established to address instances of access stimulation. NPRM ¶ 11.
- Whether revenue sharing by LECs subject to rate-of-return regulation is unreasonable. *Id.* ¶ 19.

⁴⁴ *Louisiana PSC*, 476 U.S. at 368.

⁴⁵ *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd. 17989 (2007) ("07-135 NPRM").

- Whether new tariff language is needed to address the impact of increasing revenues on switching rates. *Id.* ¶ 21.
- Whether new regulations are required in the application of the existing tariff rules. *Id.* ¶¶ 21, 25.

Moreover, in the extensive comments filed by many parties, including Qwest, AT&T, and the other large IXC's, these carriers dramatically expanded the scope of the NPRM's inquiry, proposing specific new rules and policies to address the purported problems of "traffic pumping" by CLECs.⁴⁶ Thus, the Commission's pending rulemaking proceeding in Docket No. 07-135 is actively considering literally all of the issues upon which the IUB will rule. Because the imminent *IUB Order* impinges on rulemaking and policy issues actively under consideration by the FCC, and in which the Commission has occupied the field, the *IUB Order* will merit preemption.

E. THE ORDER THAT QWEST SEEKS FROM THE IUB WOULD STAND AS AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF FEDERAL LAW

As discussed above, Qwest is seeking relief from the IUB that is in excess of the Board's jurisdiction for no other purpose than to collaterally attack this Commission's decision in the *Farmers and Merchants* proceeding in particular, and the access charge regime in general. In establishing this system, the Commission expressly noted its concerns over the exact conduct Qwest is asking the IUB to validate: the IXC's' repeated use of "self-help" by simply refusing to pay tariffed access charges:

Reacting to what they perceive as excessive rate levels, the major IXC's have begun to try to force CLECs to reduce their rates. The IXC's' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these

⁴⁶ E.g., Docket No. 07-135, Comments of Qwest Communications International Inc. at 16 (FCSC is not a customer, is a "business partner"), at 24-27 ("Further steps are necessary to prevent CLECs from engaging in access stimulation.") (Dec. 17, 2007); Comments of AT&T Inc. at 19-32 (Commission should adopt rule changes "to prevent the significant harms caused by ILEC and CLEC access stimulation schemes") (Dec. 17, 2007).

developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.

Seventh Report and Order, 16 FCC Rcd. 9923, 9932, ¶ 23 (citations omitted).

This holding is consistent with decades of FCC precedent prohibiting self-help. The Commission's position on this matter has been stated repeatedly and unequivocally: "[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties[.]" *Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone of Missouri, Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1989) (*Tel-Central*); see also *Communique Telecommunications, Inc. DBA Logically*, 10 FCC Rcd. 10399, 10405, ¶ 36 (1995).

As the Commission also has held:

The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.

Business WATS, Inc. v. AT&T Co., 7 FCC Rcd. 7942, ¶ 2 (1989) (citing *MCI Telecommunications Corporation, et al.*, 62 FCC 2d 703, ¶ 6 (1976) (hereinafter "*MCI Telecommunications Corp.*")); see also *National Communications Ass'n v. AT&T Co.*, No. 93 CIV. 3707, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001) (citing both cases).

The Bureau rejected Frontier's argument that a "dispute" as to a carrier's eligibility to receive compensation negates the IXC's obligation to pay compensation in the first instance. The Bureau stated that an IXC disputing the veracity of a LEC's certification must do so by initiating a proceeding at the Commission, e.g., through a Section 208 complaint against the LEC. We agree with the Bureau[.]

Bell Atlantic-Delaware v. Frontier Communications Services, Inc., 15 FCC Rcd. 7475, 7479-80, ¶ 9 (2000).

Qwest's invitation to the IUB to bless its anticompetitive behavior, however, would entirely undermine this Commission's precedent discussed above and threaten the ubiquity of the nation's telecommunications network. The concerted effort of the large IXCs to intimidate small, rural telephone companies into submission has had adverse effects across the nation. Qwest's proposed relief at the IUB would simply stand as an obstacle to resolve this nationwide problem. It is therefore incumbent upon this Commission, and not the IUB, to comprehensively address and reaffirm federal law.

F. BECAUSE THE SERVICES AT ISSUE ARE OVERWHELMINGLY INTERSTATE, THE STATE INTEREST IN THIS MATTER IS *DE MINIMIS*

As shown above, the great bulk of Qwest's arguments before the Board regard matters of interstate regulation: the propriety of relying on the Commission's rural exemption from the benchmark limit under the *CLEC Access Charge Order*; the use of numbering resources; and the so-called "revenue sharing" of interstate terminating access revenue. In addition, however, the types of traffic and amounts in controversy in Docket FCU 07-2 themselves demonstrate that the case is largely interstate.

Petitioners demonstrated in the record to the IUB that the conference and chat-line traffic in dispute between LECs and IXCs is overwhelmingly interstate in nature. In their written testimony to the IUB they demonstrated that 98% of their traffic terminated in Iowa is jurisdictionally interstate. At least one ILEC party to the proceeding offered to voluntarily refund the intrastate revenues it collected because they were insignificant compared to the legal costs the carrier would incur if forced to participate in the IUB's proceeding.⁴⁷ That request was summarily dismissed by the IUB.⁴⁸

⁴⁷ Motion to Dismiss Moot Complaint Against Reasnor Telephone Company, LLC (June 8, 2007).

⁴⁸ Order Denying Motion to Dismiss Moot Complaint, Granting Supplemental Motion to Compel, Denying Motion for Reconsideration, Granting Motion to Extend Hearing, and Setting Hearing, and Setting Amended Procedural Schedule (July 3, 2007).

The amount of intrastate access charges at issue in IUB Docket No. FCU-07-02 is *de minimis*. The amount of unpaid minutes invoiced by Petitioners — for which Qwest seeks to be excused from payment — are:

	Intrastate Access		Interstate Access	
Great Lakes	\$64,248	3.6%	\$1,719,911	96.4%
Superior	\$16,033	0.9%	\$1,724,770	99.1%

From these figures it is clear that there is no significant state interest that could compete with the federal interest in the issues before the Board.

CONCLUSION

For the reasons stated herein, the Commission should declare that all matters regarding interstate access services, including rates, tariffs, and revenues, are within the Commission's exclusive jurisdiction and may not be addressed by state agencies. In addition, the Commission should rule that any IUB order impinging on the Commission's interstate jurisdiction should be considered preempted.

August 14, 2009

Respectfully submitted,

By: Ross A. Buntrock
Ross A. Buntrock
Jonathan E. Canis
Adam D. Bowser
Arent Fox LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Counsel to
Great Lakes Communications Corp.
Superior Telephone Cooperative

CERTIFICATE OF SERVICE

I, Adam Bowser, do hereby certify that the foregoing **PETITION FOR DECLARATORY RULING TO THE IOWA UTILITIES BOARD AND CONTIGENT PETITION FOR PREEMPTION** was hand delivered on this 14th day of August 2009 to the following:

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, N.E., Suite 110
Washington, D.C. 20002

Chairman
Julius Genachowski
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner
Michael J. Copps
Federal Communications Commission
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Commissioner
Robert M. McDowell
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Commissioner
Mignon Clyburn
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Federal Communications Commission
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Washington, DC 20554


Adam Bowser

EXHIBIT A

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION

-----x
IN RE: :
: QWEST COMMUNICATIONS CORPORATION, :
: :
Complainant, :
vs. : DOCKET NO.
: FCU-07-2
SUPERIOR TELEPHONE COOPERATIVE; THE :
FARMERS TELEPHONE COMPANY OF RICEVILLE, :
IOWA; THE FARMERS & MERCHANTS MUTUAL :
TELEPHONE COMPANY OF WAYLAND, IOWA; :
INTERSTATE 35 TELEPHONE COMPANY, d/b/a :
INTERSTATE COMMUNICATIONS COMPANY; :
DIXON TELEPHONE COMPANY; REASNOR :
TELEPHONE COMPANY, LLC; GREAT LAKES :
COMMUNICATION CORP.; and AVENTURE : VOLUME I
COMMUNICATION TECHNOLOGY, L.L.C., :
: Respondents; :
-----x (Pages 1 - 775)
REASNOR TELEPHONE COMPANY, LLC, :
: Counterclaimant, :
vs. :
QWEST COMMUNICATIONS CORPORATION, :
: Counterclaim Respondent :
-----x

COPY

Hearing Room, 350 Maple Street
Des Moines, Iowa
Thursday, February 5, 2009

Met, pursuant to notice, at 9:00 a.m.

BEFORE: THE IOWA UTILITIES BOARD

KRISTA K. TANNER, Board Member (Presiding)
DARRELL HANSON, Board Member

EDIE SPRIGGS DANIELS - CERTIFIED SHORTHAND REPORTER
EILEEN HICKS - CERTIFIED SHORTHAND REPORTER

PETERSEN COURT REPORTERS
317 Sixth Avenue, Suite 606
Des Moines, IA 50309-4155
(515) 243-6596

1 application of the NECA rate band 8 rates by a number
2 of the LECs in this proceeding pursuant to the rural
3 exemption, which I believe a number of the LECs do
4 not qualify for.

5 Q. But the rate levels themselves are not being
6 challenged?

7 A. Well, they are in the sense that if-- The
8 rural exemption allows a rural LEC to set its rates
9 below a cap established by NECA rate band 8 if they
10 qualify for the exemption. If they don't qualify for
11 the exemption, then the rates are capped at an
12 interstate level at the incumbent LEC's rates, which
13 if it's Qwest's rate, that rate is .55 cents per
14 minute of use, which is substantially lower than NECA
15 rate band 8, so in that sense Qwest is addressing the
16 rates in this proceeding.

17 MR. HOLZ: Your Honor, may I address a
18 question for the purpose of clarification?

19 When the witness is discussing "LEC," you're
20 referring to CLECs and not LECs, correct?

21 THE WITNESS: Actually I'm referring to
22 ILECs. Excuse me. CLECs. You're right. I'm sorry.

23 BOARD MEMBER TANNER: Thank you, Mr. Holz.

24 THE WITNESS: Thank you.

25

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated;

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 9th day of February, 2009.


Edwin Spriggs
CERTIFIED SHORTHAND REPORTER

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION

----- -x
IN RE: :
: :
QWEST COMMUNICATIONS CORPORATION, :
: :
Complainant, :
vs. : DOCKET NO.
: FCU-07-2
SUPERIOR TELEPHONE COOPERATIVE; THE :
FARMERS TELEPHONE COMPANY OF RICEVILLE, :
IOWA; THE FARMERS & MERCHANTS MUTUAL :
TELEPHONE COMPANY OF WAYLAND, IOWA; :
INTERSTATE 35 TELEPHONE COMPANY, d/b/a :
INTERSTATE COMMUNICATIONS COMPANY; :
DIXON TELEPHONE COMPANY; REASNOR :
TELEPHONE COMPANY, LLC; GREAT LAKES :
COMMUNICATION CORP.; and AVENTURE : VOLUME I
COMMUNICATION TECHNOLOGY, L.L.C., :
: :
Respondents; :
----- -x (Pages 1 - 775)
REASNOR TELEPHONE COMPANY, LLC, :
: :
Counterclaimant, :
vs. :
: :
QWEST COMMUNICATIONS CORPORATION, :
: :
Counterclaim Respondent :
----- -x

COPY

Hearing Room, 350 Maple Street
Des Moines, Iowa
Thursday, February 5, 2009

Met, pursuant to notice, at 9:00 a.m.

BEFORE: THE IOWA UTILITIES BOARD

KRISTA K. TANNER, Board Member (Presiding)
DARRELL HANSON, Board Member

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EILEEN HICKS - CERTIFIED SHORTHAND REPORTER

PETERSEN COURT REPORTERS
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1 thus interstate access charges do not apply to
2 traffic that's delivered to those partners.

3 Q. And I draw your attention, sir, to page 67
4 of your direct testimony, at lines 17 to 19.

5 A. Yes.

6 Q. You state, "None of the LECs charged their
7 FCSC partners these fees, further establishing that
8 the FCSCs are not end-user customers."

9 A. Okay.

10 Q. Now, the EUCL is designed for a carrier to
11 recover the costs of provisioning a line to a person
12 to provide service.

13 A. To recover a portion of that cost, yes.

14 Q. It's a type of common-line charge?

15 A. Correct.

16 Q. Are you aware, sir, that the FCC does not
17 require competitive carriers to impose a common-line
18 charge?

19 A. Yes.

20 Q. So is the FCC creating a situation where
21 carriers have no end users?

22 A. Well, the question is an interpretation of
23 the CLC's interstate tariff.

24 The language we quoted here is in their
25 tariff, and the whole question in this proceeding is

1 does that tariff, that interstate tariff, apply to
2 the traffic that Qwest has delivered to the LECs, and
3 if that tariff says that end users are established by
4 the purchase of local-exchange service from the LEC's
5 local-exchange tariff and by the application of an
6 end-user common-line charge, then those are
7 requirements before those end users can be considered
8 for the application of switched access charges.

9 If the CLEC chooses not to apply the end-
10 user common-line charge--and I haven't looked at
11 those rules, but if they're free not to do so, then
12 they need to modify their tariff to indicate that in
13 the instance where they waive these charges--and
14 there is no such language in the tariff that I've
15 seen--that the end users are still end users for the
16 purposes of access charges.

17 Q. So a carrier can, if it chooses, impose a
18 common-line charge in its tariff?

19 A. Well, that's your language. I haven't seen
20 the FCC rules that either require or don't require
21 the application of end-user common-line charges by
22 CLECs, but the fact is I've looked at their tariffs.
23 The tariffs require the application of an end-user
24 common-line charge to end users, and they have not
25 done so.

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated;

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 9th day of February, 2009.


Edwin Spriggs
CERTIFIED SHORTHAND REPORTER

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION

COPY

----- -x
IN RE: :
: QWEST COMMUNICATIONS CORPORATION, :
: :
Complainant, :
vs. : DOCKET NO.
: FCU-07-2
SUPERIOR TELEPHONE COOPERATIVE; THE :
FARMERS TELEPHONE COMPANY OF RICEVILLE, :
IOWA; THE FARMERS & MERCHANTS MUTUAL :
TELEPHONE COMPANY OF WAYLAND, IOWA; :
INTERSTATE 35 TELEPHONE COMPANY, d/b/a :
INTERSTATE COMMUNICATIONS COMPANY; :
DIXON TELEPHONE COMPANY; REASNOR :
TELEPHONE COMPANY, LLC; GREAT LAKES :
COMMUNICATION CORP.; and AVENTURE : VOLUME II
COMMUNICATION TECHNOLOGY, L.L.C., :
: Respondents; :
----- -x (Pages 776-1094)
REASNOR TELEPHONE COMPANY, LLC, :
: Counterclaimant, :
vs. :
: QWEST COMMUNICATIONS CORPORATION, :
: Counterclaim Respondent :
----- -x

Hearing Room, 350 Maple Street
Des Moines, Iowa
Friday, February 6, 2009

Met, pursuant to adjournment, at 8:30 a.m.

BEFORE: THE IOWA UTILITIES BOARD

KRISTA K. TANNER, Board Member (Presiding)
DARRELL HANSON, Board Member

JACKIE M. SINNOTT - CERTIFIED SHORTHAND REPORTER
EILEEN HICKS - CERTIFIED SHORTHAND REPORTER

PETERSEN COURT REPORTERS
317 Sixth Avenue, Suite 606
Des Moines, IA 50309-4155
(515) 243-6596

1 BOARD MEMBER TANNER: I don't see anyone
2 taking notes. It is a possibility, you say?

3 THE WITNESS: I think that's a possibility,
4 yes.

5 BOARD MEMBER TANNER: Okay. Also on page
6 117 of your direct testimony you recommend the Board
7 prohibit LECs from participating in traffic
8 laundering. Again, if the Board only has intrastate
9 access jurisdiction, how would this resolve the
10 larger problem which also seems to be on the
11 interstate access side?

12 THE WITNESS: This you could solve both on
13 the interstate and intrastate side because you have
14 control over the telephone numbers that are assigned
15 to the LECs. You also have control over the
16 certification of the LECs in terms of what
17 territories they can serve.

18 So if we use Superior as an example, this
19 Board assigned telephone numbers for Superior's use
20 in the Superior exchange, but what they're doing is
21 now using those numbers to provide service in the
22 Great Lakes/Spencer exchange, so if you were to find
23 that they were using their numbers inappropriately,
24 they would not be able to use those numbers for
25 either intrastate or interstate traffic delivered to

C E R T I F I C A T E

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That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 11th day of February, 2009.

Jackie M. Senick
CERTIFIED SHORTHAND REPORTER

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION

COPY

----- -x
IN RE: :
:
QWEST COMMUNICATIONS CORPORATION, :
:
Complainant, :
vs. : DOCKET NO. :
: FCU-07-2 :
SUPERIOR TELEPHONE COOPERATIVE; THE :
FARMERS TELEPHONE COMPANY OF RICEVILLE, :
IOWA; THE FARMERS & MERCHANTS MUTUAL :
TELEPHONE COMPANY OF WAYLAND, IOWA; :
INTERSTATE 35 TELEPHONE COMPANY, d/b/a :
INTERSTATE COMMUNICATIONS COMPANY; :
DIXON TELEPHONE COMPANY; REASNOR :
TELEPHONE COMPANY, LLC; GREAT LAKES :
COMMUNICATION CORP.; and AVENTURE : VOLUME II :
COMMUNICATION TECHNOLOGY, L.L.C., :
:
Respondents; :
----- -x (Pages 776-1094)
:
REASNOR TELEPHONE COMPANY, LLC, :
:
Counterclaimant, :
vs. :
:
QWEST COMMUNICATIONS CORPORATION, :
:
Counterclaim Respondent :
----- -x

Hearing Room, 350 Maple Street
Des Moines, Iowa
Friday, February 6, 2009

Met, pursuant to adjournment, at 8:30 a.m.

BEFORE: THE IOWA UTILITIES BOARD

KRISTA K. TANNER, Board Member (Presiding)
DARRELL HANSON, Board Member

JACKIE M. SINNOTT - CERTIFIED SHORTHAND REPORTER
EILEEN HICKS - CERTIFIED SHORTHAND REPORTER

PETERSEN COURT REPORTERS
317 Sixth Avenue, Suite 606
Des Moines, IA 50309-4155
(515) 243-6596

1 Go ahead, Mr. Steese.

2 MR. STEESE: May I use the podium?

3 BOARD MEMBER TANNER: You may.

4 REDIRECT EXAMINATION

5 BY MR. STEESE:

6 Q. Good morning, Mr. Owens.

7 A. Good morning.

8 Q. I would like to start on redirect with some
9 questions from today's--specifically a question asked
10 by Board Member Krista Tanner, and she said what
11 ability, if any, does this Board have to prevent
12 revenue sharing at both the intra and interstate
13 levels, and you contemplated it was intrastate only.
14 Do you recall that?

15 A. Correct.

16 Q. Does the Board have the ability to prevent
17 discrimination of all types?

18 A. I believe the rules of the Iowa Board give
19 it that authority, yes.

20 Q. Does the concept of revenue sharing, as we
21 have in this case, contain facts where the local
22 exchange carrier defendants are using revenues from
23 the interstate access regime to provide kickbacks to
24 their free calling partners?

25 A. In every instance, yes.

1 Q. And given the Board has jurisdiction over
2 discrimination, have you rethought your answer to
3 Board Member Tanner?

4 A. Yes. One additional tool the Board has to
5 consider the issues in this case is if it determines
6 that the LECs are discriminating amongst customers in
7 Iowa by giving--sharing switched access charges with
8 some parties, but not others, because of the use of
9 switched access services to facilitate that
10 discrimination, then it could order that such
11 discrimination cease, which would prevent the LECs
12 from using their interstate tariffs in that manner.

13 So another way of putting it, they're using
14 the interstate tariff to facilitate discrimination.

15 Q. Then do you recall--changing subjects--
16 questions by Mr. Lee relating to the definition of
17 exchange access?

18 A. Yes, I do.

19 Q. And I don't believe it was marked as an
20 exhibit, but you can see the definition of exchange
21 access on the top from the Act, and do you see that
22 the definition of exchange access includes the words
23 "telephone exchange services"? Do you see that,
24 Mr. Owens?

25 A. I'm confused as to what this is.

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated;

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 11th day of February, 2009.

Jackie M. Smith
CERTIFIED SHORTHAND REPORTER

COPY

1095

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION

-----x
IN RE: :
: QWEST COMMUNICATIONS CORPORATION, :
: :
Complainant, :
vs. : DOCKET NO.
: FCU-07-2
SUPERIOR TELEPHONE COOPERATIVE; THE :
FARMERS TELEPHONE COMPANY OF RICEVILLE, :
IOWA; THE FARMERS & MERCHANTS MUTUAL :
TELEPHONE COMPANY OF WAYLAND, IOWA; :
INTERSTATE 35 TELEPHONE COMPANY, d/b/a :
INTERSTATE COMMUNICATIONS COMPANY; :
DIXON TELEPHONE COMPANY; REASNOR :
TELEPHONE COMPANY, LLC; GREAT LAKES :
COMMUNICATION CORP.; and AVENTURE : VOLUME III
COMMUNICATION TECHNOLOGY, L.L.C., :
: Respondents; :
-----x (Pages 1095-1451)
REASNOR TELEPHONE COMPANY, LLC, :
: Counterclaimant, :
vs. :
QWEST COMMUNICATIONS CORPORATION, :
: Counterclaim Respondent :
-----x

Hearing Room, 350 Maple Street
Des Moines, Iowa
Monday, February 9, 2009

Met, pursuant to adjournment, at 8:30 a.m.

BEFORE: THE IOWA UTILITIES BOARD

KRISTA K. TANNER, Board Member (Presiding)
DARRELL HANSON, Board Member

JACKIE M. SINNOTT - CERTIFIED SHORTHAND REPORTER
EDIE SPRIGGS DANIELS - CERTIFIED SHORTHAND REPORTER

PETERSEN COURT REPORTERS
317 Sixth Avenue, Suite 606
Des Moines, IA 50309-4155
(515) 243-6596

1 do you know the total amount of revenue that Qwest
2 earned for the traffic at issue in this case
3 factoring in both the off-netting revenue that we
4 just discussed, plus the long-distance toll revenue?

5 A. I do not.

6 Q. Now, in your direct testimony you put forth
7 a \$25 million amount of costs paid by Qwest for the
8 traffic at issue in this case. Did you personally
9 have any involvement in calculating that figure?

10 A. I did not personally calculate it. One of
11 the folks that reports to me did.

12 Q. Do you know whether that figure represents
13 both intra- and interstate traffic?

14 A. Yes, it would.

15 Q. It would involve both?

16 A. Yes.

17 Q. As far as you know, has there been a
18 separate figure computed solely for the intrastate
19 costs incurred by Qwest in this case?

20 A. Not to my knowledge. I don't know.

21 Q. And I believe you testified to this earlier,
22 but I need to ask it to make sure. That cost figure
23 contained in your testimony represents a nationwide
24 basis, not an Iowa-specific one, correct?

25 A. Correct.

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 13th day of February, 2009.

Jackie M. Smith
Edu Spriggs
CERTIFIED SHORTHAND REPORTER

COPY
STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES DIVISION

1452

-----x
IN RE: :
: QWEST COMMUNICATIONS CORPORATION, :
: :
Complainant, :
vs. : DOCKET NO.
: FCU-07-2
SUPERIOR TELEPHONE COOPERATIVE; THE :
FARMERS TELEPHONE COMPANY OF RICEVILLE, :
IOWA; THE FARMERS & MERCHANTS MUTUAL :
TELEPHONE COMPANY OF WAYLAND, IOWA; :
INTERSTATE 35 TELEPHONE COMPANY, d/b/a :
INTERSTATE COMMUNICATIONS COMPANY; :
DIXON TELEPHONE COMPANY; REASNOR :
TELEPHONE COMPANY, LLC; GREAT LAKES :
COMMUNICATION CORP.; and AVENTURE : VOLUME IV
COMMUNICATION TECHNOLOGY, L.L.C., :
: Respondents. :
-----x (Pages 1452-1953)
REASNOR TELEPHONE COMPANY, LLC., :
: Counterclaimant, :
vs. :
QWEST COMMUNICATIONS CORPORATION, :
: Counterclaim Respondent. :
-----x

Hearing Room, 350 Maple Street
Des Moines, Iowa
Tuesday, February 10, 2009

Met, pursuant to adjournment, at 8:30 a.m.

BEFORE: THE IOWA UTILITIES BOARD

KRISTA K. TANNER, Board Member (Presiding)
DARRELL HANSON, Board Member

EILEEN HICKS - CERTIFIED SHORTHAND REPORTER
JACKIE M. SINNOTT - CERTIFIED SHORTHAND REPORTER

PETERSEN COURT REPORTERS
317 Sixth Avenue, Suite 606
Des Moines, IA 50309-4155
(515) 243-6596

1 but my next question is, are you trained as an
2 attorney, Mr. Appleby?

3 A. I'm an accountant.

4 Q. Fair enough. What is your understanding of
5 reconsideration by the FCC as to an order?

6 A. It would suggest to me that the FCC was
7 given additional information after a ruling that made
8 them potentially change--potentially, I say--change
9 what they concluded in the past. Therefore, they're
10 taking that additional information under
11 consideration before they make a final ruling.

12 Q. And that final ruling has not issued yet,
13 has it?

14 A. No. So therefore we don't know what they're
15 going to say, so this particular order couldn't
16 possibly be the final answer, which is what we're
17 asking this Board to do for us.

18 Q. The FCC's decision regards the interstate
19 access charges at issue in that proceeding?

20 A. I'm sorry. I missed that. I apologize.

21 MS. JOYCE: May that question be read back?

22 (Question read by the reporter.)

23 A. I think it is much broader than just the
24 interstate rates. It was also premised upon the fact
25 of whether the free conference calling companies are,

1953

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 13th day of February, 2009.

Julian Stokes Jackie M. Smith
CERTIFIED SHORTHAND REPORTER

PETERSEN COURT REPORTERS
317 Sixth Avenue, Suite 606
Des Moines, IA 50309-4155
(515) 243-6596

EXHIBIT B

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE:

QWEST COMMUNICATIONS
CORPORATION,

Complainant,

vs.

SUPERIOR TELEPHONE
COOPERATIVE; THE FARMERS
TELEPHONE COMPANY OF RICEVILLE,
IOWA; THE FARMERS & MERCHANTS
MUTUAL TELEPHONE COMPANY OF
WAYLAND, IOWA; INTERSTATE 35
TELEPHONE COMPANY, d/b/a
INTERSTATE COMMUNICATIONS
COMPANY; DIXON TELEPHONE
COMPANY; REASNOR TELEPHONE
COMPANY, LLC; GREAT LAKES
COMMUNICATION CORP.; AND
ADVENTURE COMMUNICATION
TECHNOLOGY, LLC,

Respondents.

DOCKET NO. FCU-07-2

**ORDER DOCKETING COMPLAINT, SETTING PROCEDURAL SCHEDULE,
DENYING MOTION FOR SUMMARY JUDGMENT, DENYING MOTIONS TO
DISMISS, DENYING MOTION TO DEFER DISCOVERY, AND DENYING CROSS-
MOTION FOR EMERGENCY EVIDENTIARY HEARING**

(Issued May 25, 2007)

BACKGROUND AND PROCEDURAL HISTORY

On February 20, 2007, Qwest Communications Corporation (QCC) filed with the Utilities Board (Board) a complaint pursuant to Iowa Code §§ 476.2, 476.3, and

476.5; 199 IAC Chapters 4 and 7; and 199 IAC 22.14 alleging violations of the terms, conditions, and application of the intrastate tariffs of the following telecommunications carriers: Superior Telephone Cooperative (Superior); The Farmers Telephone Company of Riceville, Iowa (Farmers–Riceville); The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa (Farmers & Merchants); Interstate 35 Telephone Company, d/b/a Interstate Communications Company (Interstate); Dixon Telephone Company (Dixon); Reasnor Telephone Company, LLC (Reasnor); Great Lakes Communications Corp. (Great Lakes); and Aventure Communication Technology, LLC (Aventure) (collectively referred to as Respondents).

In support of its complaint, QCC claims that the Respondents are engaging in a fraudulent practice by creating a scheme that involves free conference calls, chat rooms, adult content calling, podcasts, voice mail, and international calling services. QCC asserts that the Respondents are charging QCC excessive rates for their routing of calls to companies that advertise these free services and then provide kickbacks of a portion of the terminating access revenues to these free calling service companies (FCSCs).

QCC alleges that this scenario is inconsistent with the language and representations in the Iowa Telecommunications Association Tariff No. 1 (ITA Tariff) to which Respondents subscribe. QCC states that Section 1.1 of the ITA Tariff states:

[T]he provision of [switched access service] is specifically intended to provide exchange network access to [interexchange carriers delivering intrastate switched access traffic] for their own use or in furnishing their authorized intrastate services to End Users, and for

operational purposes directly related to the furnishing of their authorized services. Operational purposes include testing and maintenance of circuits, demonstration and experimental services and spare services.

(QCC Complaint, p. 12). QCC claims that the revenue received by the Respondents is not being used for the purposes stated in the ITA Tariff. In addition, QCC states that the Respondents are charging QCC for terminating calls via their intrastate tariffs when the rates are not set forth in the tariffs and are for calls that are actually terminated outside of the Respondents' local calling areas.

QCC also alleges that the Respondents are discriminating against their other customers when they share revenues on a preferential basis with the FCSC customers and that in addition to the alleged tariff violations and discrimination, the arrangements between Respondents and the FCSCs constitute an unfair and unreasonable practice under Iowa Code § 476.3.

On March 12, 2007, Reasnor filed a motion for summary judgment with the Board and sought dismissal from this case. Reasnor states that it provides legitimate and necessary access service to QCC and that the Board does not have the authority to regulate the rates of small incumbent local exchange carriers (ILECs), such as Reasnor. Reasnor also states that granting the relief sought by QCC would unlawfully interfere with the Federal Communication Commission's (FCC) regulation of interstate conference call services. Reasnor asserts that the overwhelming majority of the traffic at issue is interstate in nature (more than 99 percent for Reasnor) and that the number of intrastate calls are too de minimus to warrant the exercise of Board jurisdiction.

On March 30, 2007, Superior, Great Lakes, and Aventure filed a joint motion to dismiss, requesting that the Board dismiss QCC's complaint against these three Respondents because the Board lacks the jurisdiction to hear QCC's complaint. In support of their motion, Superior, Great Lakes, and Aventure state that the Board does not have jurisdiction over the rates of small local exchange carriers (LECs) and consequently the Board does not have jurisdiction over the intrastate switched access charges at issue in this case.

Also on March 30, 2007, Farmers—Riceville, Farmers & Merchants, Interstate, and Dixon filed a motion to dismiss QCC's complaint against these four Respondents. In support of their motion, these companies state that QCC's complaint is about the rate QCC is being charged for terminating access, which is an issue over which the Board does not have jurisdiction. In addition, these Respondents state that the Board does not have jurisdiction over the FCSCs, over the payments by the Respondents to the FCSCs, or over the international and interstate traffic, all of which are issues raised in QCC's complaint. In addition to their motion to dismiss, these Respondents also request emergency injunctive relief to prevent Qwest from blocking calls and discontinuing service.

Also on March 30, 2007, Reasnor filed a motion to defer discovery or, in the alternative, to extend the period of time for Reasnor to respond to discovery requests propounded by QCC. In support of its motion, Reasnor states that a ruling on its motion for summary judgment may negate the need for Reasnor to respond to QCC's request. As such, Reasnor requests the Board defer Reasnor's responses until after

the Board rules on its summary judgment motion. In the alternative, Reasnor requests an extension of time to respond to the discovery requests.

On April 10, 2007, QCC filed its response to Reasnor's motion to defer its discovery responses until after the Board rules on the motion for summary judgment. In support of its response, QCC states that discovery is necessary to understand the scope of the parties' conduct in this case.

On April 12, 2007, Reasnor filed a notification with the Board that it had responded to the data requests propounded by QCC.

On April 13, 2007, QCC filed responses to Reasnor's motion for summary judgment as well as responses to the motions to dismiss filed by the other Respondents. In its response to Reasnor's motion, QCC states that Reasnor does not meet the standard for summary judgment because there is an issue of material fact before the Board. In its response to the motions to dismiss filed by the remaining Respondents, QCC states that the Board has specific jurisdiction to hear QCC's complaint and as such, the Respondents' motions should be denied.

Also as part of QCC's April 13, 2007, responses, QCC filed a cross-motion requesting an emergency evidentiary hearing before the Board to enjoin all the Respondents from continuing what QCC terms their "admitted discrimination." QCC states that in Reasnor's motion for summary judgment and in the other Respondents' motions to dismiss, all of the Respondents admit to discriminating against QCC by acknowledging compensation to the FCSCs for acting as a local exchange customer, but requiring other local exchange customers to pay tariffed rates to obtain the same

services. QCC seeks an evidentiary hearing to address this alleged discrimination issue.

On April 25, 2007, Superior, Great Lakes, and Aventure filed a reply to QCC's response to their motion to dismiss as well as a resistance to QCC's cross-motion for emergency evidentiary hearing, stating that the Board does not have jurisdiction over the issues raised by QCC and therefore cannot set an evidentiary hearing to review them.

On April 27, 2007, Reasnor filed a reply to QCC's response to Reasnor's motion for summary judgment as well as a resistance to QCC's cross-motion for emergency evidentiary hearing. Reasnor states that QCC is not a Reasnor local exchange customer and therefore QCC lacks standing to bring a complaint on behalf of retail customers based on Reasnor's alleged discrimination in the provision of local exchange service.

On May 1, 2007, Farmers–Riceville, Farmers & Merchants, Interstate, and Dixon filed their reply to QCC's response to their motion to dismiss as well as a response to QCC's cross-motion for emergency evidentiary hearing stating that such emergency adjudicative relief pursuant to Iowa Code § 17A.18A is only available to prevent immediate danger to the public health, safety, and welfare and not where the only identified harm is to the economic interest of the parties.

On May 15, 2007, QCC filed a motion to compel answers to discovery requests propounded upon Reasnor.

DISCUSSION

This order will address the motions that appear before the Board in this docket at this time. Reasnor seeks a motion for summary judgment while the remaining Respondents seek dismissal of QCC's complaint. Because the issues underlying each motion are substantially similar, the Board will address all three motions at one time. The Board will then address QCC's cross-motion for emergency evidentiary hearing. With respect to Reasnor's motion to defer discovery, the Board notes that on April 12, 2007, Reasnor filed a notification of responding to QCC's data requests. Therefore, this motion is moot. The Board notes, however, that on May 15, 2007, QCC filed a motion to compel additional discovery responses from Reasnor. This order will not address that motion since Reasnor has not had sufficient time to respond.

MOTION FOR SUMMARY JUDGMENT AND MOTIONS TO DISMISS

Reasnor's position:

On March 12, 2007, Reasnor filed a motion for summary judgment seeking dismissal from this action. In support of its motion, Reasnor states that it provides access service to interexchange carriers (IXCs), such as QCC, to permit the IXCs' customers to originate calls from, and terminate calls to, customers located in the Reasnor exchange. Reasnor also states that it has entered into a business relationship with One Rate Conferencing, LLC (One Rate), which is a conference call service provider that does business in the Reasnor exchange. Reasnor asserts that One Rate provides fee-based conference calling services to enable employees of businesses such as retailers, financial institutions, stockbrokers, and law firms to talk

with each other at the same time. Reasnor states that it is reasonable, lawful, and consistent with its tariffs and the public interest for Reasnor to enter into an arrangement with One Rate. Reasnor asserts that its relationship with One Rate increases the use of its rural telephone plant and allows Reasnor to replace deteriorating facilities because of the access revenues it receives as a result of this relationship.

Reasnor also states that it specifically relied on the FCC's decision in AT&T Corp. v. Jefferson Telephone Co., "Memorandum Opinion and Order," 16 FCC Rcd 16130 (2001), when it agreed to share some of its revenue from access services with One Rate. Reasnor states that in AT&T v. Jefferson Telephone, the FCC considered a complaint filed by AT&T concerning the lawfulness of an access revenue sharing arrangement between Jefferson Telephone and an information provider.¹ Reasnor asserts that in that case, Jefferson Telephone, an ILEC, entered into a revenue sharing arrangement with one of its customers, International Audiotext Network (IAN), an information provider of chat line services. Reasnor states that Jefferson Telephone billed AT&T for terminating access service at the tariffed rate and Jefferson Telephone then made payments to IAN based on the amount of access revenues that Jefferson Telephone received from terminating calls to IAN.² Reasnor asserts that the FCC dismissed AT&T's complaint, which alleged the access revenue

¹ Reasnor's "Motion for Summary Judgment," pp. 11-12, citing AT&T Corp. v. Jefferson Tel. Co., 16 FCC Rcd 16130 at ¶ 2.

² Reasnor's "Motion for Summary Judgment," p. 12, citing Id., at ¶¶ 4-5.

sharing arrangement unlawful, ruling that Jefferson Telephone's revenue sharing arrangement with IAN was a permissible arrangement.³

Reasnor also asserts that QCC's complaint should be dismissed with respect to Reasnor because the filed rate doctrine bars both state and federal claims that attempt to challenge the terms of a tariff that a federal agency has allowed to take effect.⁴ Reasnor claims that the filed rate doctrine bars any challenge that, "if successful, would have the effect of changing the filed tariff."⁵ Reasnor contends that QCC's complaint attempts to change Reasnor's federally-approved tariff rate for terminating access charges, which is contrary to the filed rate doctrine.

Finally, Reasnor asserts that QCC's complaint should be dismissed with respect to Reasnor because the Board lacks the authority to regulate the intrastate rates of small ILECs under Iowa law and because the FCC has exclusive jurisdiction over 99 percent of all the calls terminated by Reasnor to One Rate's conference call platform because they are interstate in nature. Reasnor argues that even though the Board has limited jurisdiction over less than one percent of the intrastate calls terminated by Reasnor to One Rate, if the federal regulation dictates one result and the state regulation another, the state regulation is preempted to the extent that it directly conflicts with federal law.

³ Reasnor's "Motion for Summary Judgment," p. 12, citing Id.

⁴ Reasnor's "Motion for Summary Judgment," p. 14, citing Evanns v. AT&T, 229 F.3d 837, 840-41 (9th Cir. 2000).

⁵ Reasnor's "Motion for Summary Judgment," p. 16, citing Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166, 1170 (9th Cir. 2002).

Respondents' positions:

The remaining Respondents offer arguments similar to Reasnor's when supporting their motions to dismiss QCC's complaint. The remaining Respondents assert that the Board lacks the jurisdiction to hear QCC's complaint. They argue that the issue before the Board is one of economics, not one of law or regulatory policy, and economics is not within the jurisdiction of the Board. Farmers-Riceville, Farmers & Merchants, Interstate, and Dixon also cite to AT&T v. Jefferson Telephone to rebut QCC's argument that the sharing of access revenue with a customer is unlawful and that QCC's assertion of discrimination and unfair and unreasonable practices are unfounded.

QCC's position:

QCC responds to Reasnor by stating that it believes it has evidence indicating that Reasnor has an access revenue sharing relationship with an FCSC other than One Rate and that Jefferson is not controlling in this case because Jefferson never addressed the issue of discrimination in the provision of local exchange service. In addition, QCC responds to all Respondents by asserting that the Board has jurisdiction to hear QCC's complaint against all of the Respondents because the Board has the authority to hear complaints regarding intrastate local exchange service provided pursuant to the Respondents' local exchange tariffs on file with the Board. Finally, QCC asserts that the Board has the authority to hear its complaint against all of the Respondents because the issue before the Board involves discrimination in the provision of local services and the Board has express jurisdiction to hear such complaints.

Discussion:

Summary judgment is appropriate if the entire record, including pleadings and affidavits on file, demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). A motion to dismiss should be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Dible v. Scholl, 410 F. Supp. 2d 807, 810-11 (N.D. Iowa 2006). After reviewing the motions and responses filed by the parties in light of these standards, the Board will deny Reasnor's motion for summary judgment and deny the other Respondents' motions to dismiss.

Reasnor claims that its business relationship with One Rate is consistent with its filed local exchange tariff and that the FCC has approved similar access revenue sharing arrangements. QCC argues, however, that Reasnor has access revenue sharing arrangements with other FCSCs in addition to One Rate and the question remains before the Board as to whether those relationships are also consistent with Reasnor's local exchange tariff.

Reasnor and the other Respondents argue that the Board lacks the authority to regulate the rates of small LECs and that because intrastate traffic makes up such a small percentage of the total traffic terminated by Reasnor and the Respondents, any decision by the Board may be contrary to any decision by the FCC regarding interstate and international traffic and therefore may be preempted to the extent that it directly conflicts with federal law. QCC argues that despite the small percentage of traffic that is intrastate, the Board has jurisdiction to hear the complaint regarding that

traffic. In addition, QCC argues that this case raises the issue of discrimination among the Respondents' local exchange customers and that a claim of discrimination is within the Board's jurisdiction.

The Board finds that there are genuine issues of material fact regarding the revenue sharing arrangements and the Respondents' local and intrastate access service tariffs. The Board also finds that it has the authority to hear QCC's complaint as it relates to intrastate traffic. The Board is aware of its jurisdictional limits with respect to interstate and international traffic, which is at issue in various proceedings before both the FCC and federal courts. However, the Board finds that it is appropriate for the issue as it relates to intrastate traffic to be before the Board at this time.

In its complaint, QCC raises the issue of whether there is unlawful discrimination by the Respondents against their other customers when they share access revenues on a preferential basis with selected customers. The Respondents assert that there is no discrimination at issue in this case because the FCC has determined in AT&T v. Jefferson Telephone that access revenue sharing arrangements are acceptable. QCC distinguishes Jefferson Telephone from the present case by stating that in Jefferson Telephone, the FCC did not address the issue of discrimination, an issue that QCC specifically raised in its initial complaint. Moreover, the Respondents assert that QCC does not have the proper standing to bring this issue before the Board, but QCC contends that the Respondents' alleged discrimination is violative of fair competition and the public interest.

It is clear from the filings submitted by the parties that there is a genuine issue of material fact regarding the issues raised by QCC in its petition. Moreover, given the controversy surrounding the issues raised by QCC, the Respondents have not met the standard for dismissal of QCC's petition. Therefore, the Board will deny Reasnor's motion for summary judgment and deny the other Respondents' motions to dismiss. The Board will docket QCC's complaint pursuant to the statutes and rules cited therein and establish a procedural schedule for an investigation of these issues and any others that may develop during the course of this proceeding.

The Board notes that there were many arguments made by the parties in support of their respective motions and responses. The Board has considered all of the issues raised by the parties, but some of these arguments are not mentioned in this analysis because, at this point of the proceedings, those arguments are not persuasive. If any of these issues develop into more substantive arguments throughout this proceeding, the Board will address them at the appropriate time.

QCC'S CROSS-MOTION FOR EMERGENCY EVIDENTIARY HEARING

Parties' positions:

QCC seeks an emergency evidentiary hearing to discern the scope of the alleged discriminatory conduct of all of the Respondents. Reasnor responds by stating that no emergency hearing is required because QCC is not a local exchange customer of Reasnor and therefore lacks the proper standing to bring such a complaint. Superior, Great Lakes, and Aventure respond by stating that the conduct alleged by QCC relates solely to access rates and the Board has no jurisdiction over access charges, which are exempt from rate regulation under Iowa Code § 476.1.

Finally, Farmers–Riceville, Farmers & Merchants, Interstate, and Dixon respond by stating that Iowa Code § 17A.18A suggests that QCC can only obtain the type of emergency relief requested if it can establish that it is necessary to prevent an immediate danger to the public health, safety, or welfare and that QCC has failed to meet that burden.

Discussion:

The Board agrees with the position asserted by Farmers–Riceville, Farmers & Merchants, Interstate, and Dixon and finds that QCC has not alleged facts sufficient, if proven, to meet its burden under Iowa Code § 17A.18A. That section provides that "an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action." QCC's motion for emergency adjudicative proceeding does not allege or demonstrate an immediate danger to the public health, safety, and welfare. QCC identified only a potential economic harm to itself and to other carriers. The Board believes that as a general proposition and in the absence of unique circumstances not alleged here, economic disputes between carriers do not rise to the level of an immediate danger to public health, safety, and welfare so long as no party is threatening to block emergency calls as a response to the economic dispute. Therefore, the Board will deny QCC's request for emergency adjudicative relief.

DOCKETING COMPLAINT

QCC filed its initial complaint pursuant to 199 IAC chapters 4 and 7, and 199 IAC 22.14, and Iowa Code §§ 476.2, 476.3, and 476.5. QCC's complains about the

terms, conditions, and application of the intrastate access services tariff of the named Respondents. The Board has reviewed the complaint and responses filed by the named Respondents and will docket the complaint for further investigation pursuant to Iowa Code §§ 476.2, 476.3, and 476.5, and 199 IAC chapters 4 and 7, and 199 IAC 22.14.

In its complaint, QCC also requested emergency injunctive relief to prohibit the Respondents from directly or indirectly sharing any switched access revenue with any of its customers, to prohibit the Respondents from billing QCC for switched access revenues in excess of the amounts billed during the first six months of 2005, and to permit QCC to block retail and wholesale traffic bound for any of the Respondents' exchanges. As discussed above, the Board finds that QCC has not demonstrated that it will suffer irreparable harm if the injunction is not granted or that there is an immediate danger to the public health, safety, or welfare. Therefore, the Board will deny the request for injunctive relief. However, the Board will set an appropriate procedural schedule to get to the merits of this dispute in a timely manner.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The complaint filed by Qwest Communications Corporation on February 20, 2007, against the following named Respondents: Superior Telephone Cooperative; The Farmers Telephone Company of Riceville, Iowa; the Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone

Company, d/b/a Interstate Communications Company; Dixon Telephone Company; Reasnor Telephone Company, LLC; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, is docketed for investigation as Docket No. FCU-07-2, pursuant to the statutes and rules identified in the complaint. The complaint is docketed for investigation of the matters asserted in the complaint and such other issues as may develop during the course of the proceedings.

2. The following procedural schedule is established for this proceeding:

a. Qwest Communications Corporation and any intervenors aligned with QCC shall file prepared direct testimony, with supporting exhibits and workpapers, on or before July 9, 2007.

b. Respondents and any intervenors aligned with them shall file rebuttal testimony, with supporting exhibits and workpapers, on or before July 30, 2007.

c. Qwest Communications Corporation and any intervenors aligned with QCC shall file reply testimony, with supporting exhibits and workpapers, on or before August 20, 2007.

d. A hearing for the purpose of receiving testimony and cross-examination of all testimony will commence at 9 a.m. on Wednesday, September 19, 2007, in the Board's hearing room, 350 Maple Street, Des Moines, Iowa. Parties shall appear at the hearing one-half hour prior to the time of hearing to mark exhibits. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at 515-281-5256 to request appropriate arrangements.

e. Any party desiring to file a brief may do so on or before October 8, 2007.

3. In the absence of objection, all workpapers shall become a part of the evidentiary record at the time the related testimony and exhibits are entered in the record.

4. In the absence of objection, all data requests and responses referred to in oral testimony or cross-examination, which have not previously been filed with the Board, shall become a part of the evidentiary record. The party making reference to the data request or response shall file an original and six copies at the earliest possible time.

5. In the absence of objection, if the Board calls for further evidence on any issue and that evidence is filed after the close of hearing, the evidentiary record shall be reopened and the evidence will become a part of the evidentiary record three days after filing. All evidence filed pursuant to this paragraph shall be filed no later than five days after the close of hearing.

6. Pursuant to 199 IAC 7.7(2) and (11), the time for filing responses or objections to data requests and motions will be shortened to five days from the date the motion is filed or the data request is served. All data requests and motions should be served by facsimile transfer or by electronic mail, in addition to United States mail.

7. The "Motion for Summary Judgment" filed by Reasnor Telephone Company, LLC, on March 12, 2007, is denied.

8. The "Motion to Dismiss" filed by Superior Telephone Cooperative; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, on March 30, 2007, is denied.

9. The "Motion to Dismiss" filed by The Farmer Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; and Dixon Telephone Company on March 30, 2007, is denied.

10. The motion to defer discovery filed by Reasnor Telephone Company, LLC, on March 30, 2007, is denied for mootness.

11. The cross-motions requesting emergency evidentiary hearing filed by Qwest Communications Corporation on April 13, 2007, are denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Krista K. Tanner

Dated at Des Moines, Iowa, this 25th day of May, 2007.



CHESTER J. CULVER, GOVERNOR
PATTY JUDGE, LT. GOVERNOR

JOHN R. NORRIS, CHAIRMAN
CURTIS W. STAMP, BOARD MEMBER
KRISTA K. TANNER, BOARD MEMBER

QWEST COMMUNICATIONS CORPORATION, COMPLAINANT, VS. SUPERIOR
TELEPHONE COOPERATIVE; THE FARMERS TELEPHONE COMPANY OF
RICEVILLE, IOWA; THE FARMERS & MERCHANTS MUTUAL TELEPHONE
COMPANY OF WAYLAND, IOWA; INTERSTATE 35 TELEPHONE COMPANY d/b/a
INTERSTATE COMMUNICATIONS COMPANY; DIXON TELEPHONE COMPANY;
REASNOR TELEPHONE COMPANY, LLC; GREAT LAKES COMMUNICATIONS
CORP.; AND AVENTURE COMMUNICATION TECHNOLOGY, LLC, RESPONDENTS.

Docket No. FCU-07-2

"ORDER DENYING MOTION TO DISMISS MOOT COMPLAINT, GRANTING
SUPPLEMENTAL MOTION TO COMPEL, DENYING MOTION FOR
RECONSIDERATION, GRANTING MOTION TO EXTEND HEARING, AND
SETTING HEARING, AND SETTING AMENDED PROCEDURAL SCHEDULE"

Issued July 3, 2007

Parties Served:

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Qwest Corporation
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Des Moines, Iowa 50309

✓ Thomas G. Fisher, Jr.
Parrish, Kruidenier, Dunn, Boles,
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John R. Perkins
Consumer Advocate
Iowa Department of Justice
Office of Consumer Advocate
310 Maple Street
Des Moines, IA 50319-0063

CERTIFICATE

The undersigned hereby certifies that the foregoing
document has been served upon all parties of
record in this proceeding in accordance with the
requirements of the rules of the Iowa Utilities Board.

Dated July 3, 2007
Donna Schullinger

350 MAPLE STREET / DES MOINES, IOWA 50319-0069 / 515.281.5979 / FAX 515.281.5329
[HTTP://WWW.STATE.IA.US/IUB](http://www.STATE.IA.US/IUB)

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2-1007

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE:

QWEST COMMUNICATIONS
CORPORATION,

Complainant,

vs.

SUPERIOR TELEPHONE
COOPERATIVE; THE FARMERS
TELEPHONE COMPANY OF RICEVILLE,
IOWA; THE FARMERS & MERCHANTS
MUTUAL TELEPHONE COMPANY OF
WAYLAND, IOWA; INTERSTATE 35
TELEPHONE COMPANY, d/b/a
INTERSTATE COMMUNICATIONS
COMPANY; DIXON TELEPHONE
COMPANY; REASNOR TELEPHONE
COMPANY, LLC; GREAT LAKES
COMMUNICATION CORP.; AND
AVENTURE COMMUNICATION
TECHNOLOGY, LLC,

Respondents.

DOCKET NO. FCU-07-2

**ORDER DENYING MOTION TO DISMISS MOOT COMPLAINT,
GRANTING SUPPLEMENTAL MOTION TO COMPEL, DENYING MOTION FOR
RECONSIDERATION, GRANTING MOTION TO EXTEND HEARING, AND
SETTING AMENDED PROCEDURAL SCHEDULE**

(Issued July 3 , 2007)

On February 20, 2007, Qwest Communications Corporation (QCC) filed with
the Utilities Board (Board) a complaint against the above named Respondents,

asserting in part that the Respondents are engaging in a fraudulent practice by creating a scheme that involves free conference calls, chat rooms, adult content calling, podcasts, voice mail, and international calling services. QCC's complaint alleges that the Respondents are charging QCC excessive rates to route calls to companies that advertise these free services and then provide kickbacks of a portion of the terminating access revenues to these free calling service companies (FCSCs).

On June 8, 2007, Reasnor Telephone Company, LLC (Reasnor), filed with the Board a motion to dismiss the complaint filed by QCC on February 20, 2007, on grounds of mootness. In support of its motion, Reasnor states that it began providing intrastate access service to QCC in January 2006, after acquiring the Reasnor, Iowa, exchange from Sully Telephone Association, Inc. Reasnor asserts that since January 2006, Qwest has paid Reasnor a total of \$6,123.92 for intrastate access service. Reasnor states that it decided to moot QCC's complaint, without admitting liability, by providing QCC with a full credit for the entire amount that QCC has paid to Reasnor for intrastate access service. Reasnor also states that it will not continue to bill QCC in the future for intrastate access service for the termination of conference calls, unless Reasnor obtains an order from the Board authorizing it to do so. Reasnor asserts that the full credit given to QCC is the maximum amount that the Board could award QCC, therefore, QCC's complaint against Reasnor is moot and should be dismissed.

On June 19, 2007, QCC filed a resistance to Reasnor's motion to dismiss. As part of its resistance, QCC states that according to its data, Reasnor began charging

QCC terminating access charges prior to January 2006, as asserted by Reasnor. QCC states that because of the discrepancy in starting date, the amount of money that Reasnor has paid to QCC is subject to question. QCC also asserts that Reasnor's attempt to moot QCC's complaint ignores QCC's claim of discrimination in the provision of local exchange service and fails to address the issues of declaratory and prospective relief.

The Board will deny Reasnor's motion to dismiss. Despite Reasnor's credit to QCC, there is a genuine issue of material fact regarding the amount. Reasnor claims that it began assessing QCC intrastate switched access service charges in January 2006. QCC counters that Reasnor began assessing access service charges to QCC prior to January 2006. Since a factual dispute remains before the Board regarding the timing of the access charge assessment and consequently of the amount of the credit, QCC's complaint is not moot and the Board cannot grant Reasnor's motion. Moreover, even if the credit issue were resolved, QCC has made other claims that would not be resolved by a credit alone, so even a larger credit would not make the matter entirely moot. Reasnor's motion to dismiss will be denied.

On June 12, 2007, QCC filed a supplemental motion to compel Reasnor to provide complete answers to its second set of interrogatories and data requests. QCC states that in response to QCC's second set of written discovery, Reasnor mischaracterizes the nature of QCC's discovery requests and argues that the requests are overbroad, burdensome, and not relevant, claiming that QCC's inquiries should be limited to intrastate traffic. QCC asserts that its second set of discovery

requests were designed to elicit information regarding the issues raised in QCC's complaint, namely discriminatory conduct in the provision of local services, the practices of any incumbent local exchange carrier (ILEC) in Iowa regarding its tariffs filed with the Board, whether an ILEC is charging terminating access charges without terminating the traffic locally, and whether intrastate services are appropriately set forth in tariffs and are sold pursuant to tariff terms. QCC asserts that the Board has jurisdiction to hear all of these issues. In addition, QCC states that even if a particular type of traffic falls outside the Board's jurisdiction, specifically interstate traffic, discovery is not restricted so long as it is reasonably calculated to lead to the discovery of admissible evidence.

On June 22, 2007, Reasnor filed a resistance to QCC's supplemental motion to compel. Reasnor used its resistance to QCC's motion primarily as an opportunity to argue in support of its motion to dismiss. Reasnor also states that QCC's complaint is moot because QCC received a full credit with respect to intrastate calls and because of Reasnor's agreement to refrain from billing QCC for intrastate conference calls in the future. Reasnor argues that since QCC's complaint is moot, the Board should deny QCC's supplemental motion to compel and reconsider the Board's June 18, 2007, order in this docket requiring Reasnor to fully respond to QCC's first set of discovery requests.

The Board will grant QCC's supplemental motion to compel filed on June 12, 2007. The arguments raised by Reasnor supporting its responses to QCC's supplemental motion are now moot following the Board's previous discussion

regarding Reasnor's motion to dismiss. The Board will also deny Reasnor's request to reconsider the Board's June 18, 2007, order because the Board has determined that QCC's complaint is not moot.

The Board finds that QCC's second set of discovery requests were reasonably designed to elicit information regarding the issues raised in its complaint and that the Board has jurisdiction to hear all of these issues. In addition, the Board finds that QCC's discovery requests need not be restricted to intrastate traffic as long as requests regarding interstate traffic are reasonably calculated to lead to the discovery of admissible evidence as provided for in Iowa Rule of Civil Procedure 1.503(1). Based on these findings, the Board directs Reasnor to provide complete and thorough responses to the second set of discovery requests propounded by QCC on Reasnor.

On June 12, 2007, QCC filed a motion to extend the hearing date in this proceeding. Pursuant to the procedural schedule issued by the Board on May 25, 2007, the hearing in this proceeding is scheduled to begin on September 19, 2007. In support of its request to continue the hearing date, QCC states that it has served discovery requests on all of the eight respondents in this matter. In addition, QCC states that it has served 25 parties with subpoenas for additional discovery. QCC states that it must gather the information requested, and assimilate and analyze the information. QCC asserts that this work cannot reasonably be completed under the existing procedural schedule. No objection to QCC's motion has been filed.

The Board has reviewed QCC's request and finds that it is reasonable. Since there is no objection to QCC's request, the Board will grant the motion and extend the hearing date until October 23, 2007. An amended procedural schedule will be established accordingly.

IT IS THEREFORE ORDERED:

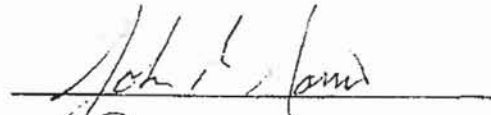
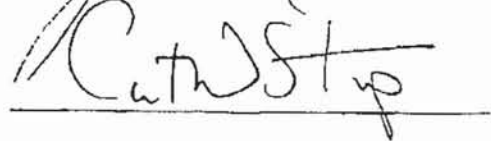
1. The motion to dismiss filed by Reasnor Telephone Company, LLC, on June 8, 2007, is denied as described in this order.
2. The supplemental motion to compel filed by Qwest Communications Corporation on June 12, 2007, is granted as described in this order.
3. The motion for reconsideration filed by Reasnor Telephone Company, LLC, on June 22, 2007, is denied as described in this order.
4. The motion to extend the hearing in this proceeding filed by Qwest Communications Corporation on June 12, 2007, is granted as described in this order.
5. The procedural schedule in this docket is amended to reflect the following changes:
 - a. Qwest Communications Corporation (QCC) and any intervenors aligned with QCC shall file prepared direct testimony, with supporting exhibits and workpapers, on or before August 6, 2007.
 - b. Respondents and any intervenors aligned with them shall file rebuttal testimony, with supporting exhibits and workpapers, on or before September 4, 2007.

c. Qwest Communications Corporation and any intervenors aligned with QCC shall file reply testimony, with supporting exhibits and workpapers, on or before September 24, 2007.


d. A hearing for the purpose of receiving testimony and cross-examination of all testimony will commence at 9 a.m. on Tuesday, October 23, 2007, in the Board's hearing room, 350 Maple Street, Des Moines, Iowa. Parties shall appear at the hearing one-half hour prior to the time of hearing to mark exhibits. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at 515-281-5256 to request appropriate arrangements.

e. Any party desiring to file a brief may do so on or before November 19, 2007.

UTILITIES BOARD

ATTEST:


Executive Secretary, Deputy



Dated at Des Moines, Iowa, this 3rd day of July, 2007.